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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Great Atlantic & Pacific Tea Company, Inc. ("A&P"), by its undersigned attorneys, respectfully petitions that a writ of certiorari issue to review the judgment and order entered in the United States Court of Appeals for the Second Circuit on June 21, 1977 (Appendix A), as to which a timely petition for rehearing was denied on August 8, 1977 (Appendix B). This petition is filed within 90 days of that date, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The opinion of the Court of Appeals (App. A) is reported at 557 F.2d 971. It affirmed an opinion of the Federal Trade Commission ("FTC" or "Commission") dated April 29, 1976, 87 F.T.C. 962, 1047-73, relevant excerpts from which are annexed as Appendix C (pp. 35a-57a).

Questions Presented

The basic issue here is whether a buyer who accepts a price offered to him on the basis of meeting competition is liable for inducing an illegal price discrimination unless he can prove, to the FTC's satisfaction under strict standards, that his seller's price was cost justified. Put in Robinson-Patman Act terms, the questions are whether the court below properly found that a buyer violates § 2(f) merely by accepting what he believes is the better of two competing offers when:

(a) the FTC held that the buyer did not act in an unfair or deceptive manner (App. C, pp. 36a-39a);

(b) there was no finding that the seller's offer was not cost justified, was not within the meeting competition defense, or was otherwise illegal (App. A, pp. 19a, 24a-25a);

(c) the buyer was admittedly "deprived" of the statutory "meeting competition" defense (App. A, pp. 17a-22a), even though the competing prices differed by only ⅓ of 1%; and

(d) the buyer was given the almost impossible burden of reconstructing his seller's costs, over six years after the event, and of proving cost justification.

Statutory Provisions

The statutes involved are §§ 2(a), (b) and (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (b) and (f), and Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) ("§ 5 of the FTC Act"). These are reproduced at Appendix D, pp. 58a-60a.

Statement of the Case

The FTC's complaint was issued on October 8, 1971. It attacked a 1965 agreement between A&P and Borden, Inc. ("Borden") under which Borden began supplying "A&P" label milk and other dairy products to A&P's Chicago Unit.[1] The first two counts charged A&P alone with unfair and deceptive practices in violation of § 5 of the FTC Act and with receipt of an unlawful price discrimination in violation of § 2(f) in entering this private label arrangement. Count III charged A&P and Borden with combining to stabilize and maintain prices, contrary to § 5 of the FTC Act.

The administrative law judge dismissed Count III but found against A&P on Counts I and II. The Commission dismissed Count I, holding that A&P had not acted unfairly or deceptively in its dealings with Borden. Thus there remains only the § 2(f) charge.

As the Commission's opinion states: "Although the record in this case is voluminous, exceeding 20,000 pages, the facts are generally not disputed" (App. C, p. 35a).[2] In late 1964, A&P's national director of purchases in New York advised his subordinates (including the Chicago Division purchasing director, who in turn relayed the information to the new Chicago Unit buyer, Elmer Schmidt) that in the New York area Borden had offered A&P price reductions of about one million dollars a year if A&P

[1] This was one of 32 "Units", reporting to seven "Divisions", into which A&P had grouped its retail grocery stores; it included over 200 stores in Northern Illinois and about 35 in neighboring Northwestern Indiana.

[2] This is so despite the fact that the hearing took a monumental 110 hearing days spread over three years, apparently establishing an FTC "record" for time-consuming and expensive hearings.

switched from the Borden label to an A&P label and accepted reductions in delivery and other services. Mr. Schmidt, who was not an experienced dairy buyer, asked Borden, then A&P's dairy supplier in Chicago, for an A&P label quotation under whatever conditions would cut Borden's costs as much as possible.[3] He added that A&P wanted a price which would allow Borden a profit on this business; this was in keeping with A&P practice, one purpose of which is to assure the continued viability of suppliers.

In response, Borden submitted an August, 1965 quotation in which 11 of the 22 dairy products Borden sold to A&P in Chicago would be available under the A&P label, and delivery service would be reduced for all dairy products sold. The only price reductions, however, were on the A&P label products. Borden claimed that, at the prices it then offered, A&P could expect to realize a "saving" of some $410,000 annually on its purchases of the 11 items offered under the A&P label.[4]

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[3] The changes made included "store-door drop delivery" and "no returns"—instead of the previous delivery into the dairy case, rotation of products there, and taking back outdated or spoiled products at Borden's expense. Products had to be "preordered" by A&P's stores well before delivery, instead of ordering from the delivery truck on its arrival. There were to be no special deliveries, no advertising or merchandising materials or allowances, and no demonstrators or special displays. Reductions in price to meet competition from other retailers are customary since the dairy usually has the risk of spoilage, but these too were eliminated. *Not one of the Borden customers allegedly discriminated against received such spartan treatment.*

[4] Borden's estimates of what A&P would "save" by accepting Borden's offers were always based on ignoring any increased costs that might result to A&P and on the three assumptions that in the Chicago area: (a) A&P would switch all of its purchases to private label, (b) A&P's sales of these products would remain as high as in the previous year ($5,600,000 on the 11 private label items), and (c) Borden's brand label prices would remain at their existing levels. As it turned out, these "savings" estimates were highly

The services Borden was eliminating were to cause A&P increased labor and other expenses which threatened to wipe out this "saving", and A&P's buyer therefore made inquiries of four other dairies. He succeeded in eliciting only one additional quotation for all of A&P's Chicago area business—from Bowman Dairy.

Because Bowman had to comply with a 1963 Robinson-Patman decree, its offer was prepared carefully (with the help of cost accountants and outside counsel) and it was prepared to make the same offer to other purchasers if it had been accepted by A&P. Bowman saw cost savings in reduced services rather than any elimination of advertising expenses, and so it offered the *same* prices for A&P label or for Bowman label, at A&P's option. Bowman's prices and terms were significantly lower than Borden's on all 22 products, and Bowman's former General Manager testified that even further price reductions would have been available to A&P if Bowman reduced its milk butterfat content and A&P preordered merchandise, since neither of these cost savings was taken into account in the Bowman offer.[5]

A&P's Unit buyer was impressed by Bowman's price. Looking only at the 11 items on which Borden's offer was stated to yield a $410,000 price reduction, he saw that the Bowman proposal would result in a $737,000 reduction.

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inflated, in part because the last two assumptions proved contrary to fact. When A&P went to private label, Borden reduced its brand label prices to precisely those quoted in this first private label offer—thus eliminating the entire $410,000 alleged "saving" offered in August of 1965. Moreover, A&P lost sales volume when it switched to the A&P label.

[5] Bowman's offer was for milk with a 3.5% butterfat content while Borden's milk had 3.4%. It is common for dairies to remove butterfat from milk (for use in making ice cream) and to reduce the price of the milk by the recognized market value of the butterfat.

According to the Borden witnesses, Schmidt told them that Borden's offer was "not even in the ball park", "so far out of line it is not even funny", and that if Borden were to improve its offer by $50,000 per year, even that additional saving "would not be a drop in the pocket". They testified that these remarks (which were, of course, quite true) were the *only* clues they had to the competition they were facing. They did not ask either the identity of the other bidder or the prices quoted, nor did A&P volunteer this information.

The Borden negotiators believed that, in view of their long-standing relationship with A&P, they could retain A&P's business (which had been worth $1,600,000 gross profit per year to Borden) even at a slightly higher price than a competitor. They decided to double the "$410,000 saving" and to submit a new quotation showing a "saving" of $820,000 per year. Schmidt's response was: "Now you are in the ballpark". He recommended staying with Borden and told Bowman that there were "so few differences" between the two proposals that he had decided not to change suppliers.

Although there is evidence that Schmidt considered Borden's final offer more favorable than Bowman's, the two offers were at almost identical prices on the items on which Borden was reducing its prices. The specific prices for the Chicago-Calumet area for the three basic items were as follows:[6]

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[6] Quarts, half gallons and gallons of regular homogenized milk sold in the Chicago-Calumet area alone made up most of the Chicago Unit's total dairy purchases. Moreover, these three packages accounted for substantially all of the allegedly discriminatory sales since the court below held that it had "no Robinson-Patman jurisdiction" as to products other than fluid milk (*e.g.*, cottage cheese, fortified skim milk, buttermilk, eggnog, onion dip, sour cream)

	Quarts	*Half Gallons*	*Gallons*
Original Borden Quote	$.1855	$.3430	$.6860
Bowman Quote	.1696	.3136	.6272
Final Borden Quote	.1712	.3124	.6248

Bowman was thus lower on the quart size by 1.6 mills while Borden was lower on the half gallon and gallon sizes by 0.6 of a mill a quart (or about ⅓ of 1% of the price).[7]

According to Borden's witnesses, when they delivered their final offer, they stated that it was being made to meet competition. Mr. Schmidt testified: "they used the phrase 'meeting competition' or 'beating competition' . . . [but] . . . I considered it salesmen's talk."

Borden accompanied its formal offer to A&P with a letter from Borden dated October 1, 1965, which read in full as follows:

> "You have our price quotations dated September 21, 1965 for milk, cream and other dairy products for several areas in Indiana and Illinois. We wish to assure you that our prices are proper under applicable law and we are prepared to defend these prices.
>
> "We appreciate your patronage."

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because these products "were chemically changed from their origin as raw milk by a variety of processes and additions at Borden's Woodstock plant" (App. A, p. 13a, fn. 7).

[7] These comparisons do not take into account the facts that Bowman (a) was offering its own brand or private label at A&P's option, (b) was offering price reductions on the entire line, and (c) would have charged an even lower price at the lower butterfat content offered by Borden, or with preordering by A&P. When these facts are considered, Bowman's offer was substantially lower than Borden's. However, because Mr. Schmidt never took these other factors into account, the Commission and the court of appeals disregarded them also.

The "meeting competition" remark was never reduced to writing, nor was it conveyed orally to anyone at A&P other than Schmidt, who did not repeat it. At no time did Borden state that the prices quoted were *not* cost justified or would *not* be offered generally.

The Borden offer and assurance letter were forwarded to A&P's New York headquarters along with a recommendation for approval from the Chicago Unit. That recommendation was accepted with the concurrence of A&P's legal department and the reduced delivery program was commenced in November, 1965.

In 1968, A&P's Chicago Unit became aware that Borden had given lower prices to Eagle Food Centers when Borden gave the few A&P stores in Eagle's area a reduction in A&P label prices to match the prices to Eagle. Thereafter, in April of 1971, A&P's Chicago Unit was offered lower prices by two other Chicago dairies (Dean Milk and Spinney Run). In February of 1972, A&P changed to those dairies and terminated Borden as a supplier in Chicago. Consequently, by the time the hearings below were commenced in 1973, Borden (which has always considered its costs highly confidential) had little incentive to help A&P reconstruct Borden's 1965 costs.[8]

[8] In 1971, a treble damage action, purportedly on behalf of a class consisting of Borden customers and tracking the Robinson-Patman charges made here, was filed in the Chicago district court. *Parker, et al.* v. *A&P and Borden,* Dkt. 71-C-3075. In that action, which is still pending, A&P had cross-claimed against Borden (for indemnification based on its assurance letter quoted above) before the FTC hearings commenced.

Reasons for Granting the Writ

This case raises the fundamental issue of the circumstances in which a buyer may accept the lowest price offered by competing sellers without incurring Robinson-Patman Act liability. This problem occurs daily in the business world, and its resolution will directly affect the extent and vigor of competitive bargaining between buyers and sellers, as well as whether large commercial buyers may continue to accept cost savings which they cannot prove because only their sellers have the information necessary to establish a cost justification defense. Even more important, the outcome will determine whether the benefits of bargaining and lower costs, in the form of lower prices, can be made available to consumers. Thus this case presents basic, important and recurring questions.

This Court has only once considered the circumstances under which a buyer may be found liable under § 2(f), and that was almost 25 years ago in *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61 (1953). The decision below stands that ruling on its head. *Automatic Canteen* held that a buyer is not liable under § 2(f) unless he knew of the price discrimination and that the seller had no "meeting competition" or "cost justification" defense (346 U.S. at 74). Here, there was no finding that Borden did not have either of these defenses, or that its prices violated § 2(a), so there was obviously no basis for any conclusion that A&P "knew" of these facts. Moreover, the precise issue in *Automatic Canteen* was whether the buyer has the burden of proving cost justification where (as here) the methods by which he is served, or the quantities in which he buys, differ from the way in which his competitors made their purchases. In such a case, this Court held it is the *Commission* which must "show that such differences could not

give rise to sufficient savings . . . to justify the price differential" (346 U.S. at 80).

The court below held that a buyer is "properly deprived" of the shelter of the "meeting competition" defense whenever the buyer accepts from a seller, who states he is attempting to meet a competitive offer, a price lower than that offer (App. A, pp. 17a-22a). Having thus summarily stripped A&P of the "meeting competition" defense, it went on to rule that the Commission need not prove that the seller violated the Act, and that the cost justification defense is not available in a § 2(f) case unless the *buyer* can prove to the Commission's satisfaction, years after the event, that the *seller's* cost savings were sufficient to justify the prices in issue. All of these key rulings, we submit, endanger the robust bargaining between buyer and seller which this Court sought to foster in the *Automatic Canteen* case. That approach was applauded by the 1955 Attorney General's National Committee to Study the Antitrust Laws as reconciling the Robinson-Patman Act with "broader antitrust policies". The Committee's report stated:

> "In markets characterized by sellers enjoying a significant degree of control over price, the exertion of offsetting force by some large and aggressive buyers bargaining for concessions can contribute materially to lower prices for all. Not only is one reduction likely to spread; but each entering wedge enhances the negotiating position of other traders who can insist on equal concessions from the supplier with the ancient gambit of buying elsewhere unless he accedes." (*Report of the Attorney General's National Committee to Study the Antitrust Laws* 196 (March 31, 1955; footnote omitted))

The entire case against A&P rested on (a) a showing that there were price differences between A&P and other Borden customers (who were admittedly served differently), (b) the outright denial of the "meeting competition" defense to A&P, on the theory that A&P waived that defense when it accepted what it believed to be the lower offer, and (c) the practical denial of the "cost justification" defense by imposing on A&P the impossible burden of reconstructing Borden's 1965 costs many years later.

This decision is not only irreconcilable with *Automatic Canteen,* it is internally inconsistent with the Commission's ruling that A&P did not deceive Borden or treat it unfairly in violation of the policy underlying § 2(f). Furthermore, it is inconsistent with the rulings of other circuit courts on the question of how rigidly the "meet but not beat" doctrine should be applied.

Unless reversed, this novel approach to a buyer's liability will result in restraining bargaining by buyers and competition among sellers—and, in consequence, higher prices to consumers. Such public mischief should not be allowed to occur without at least a review by this Court.

I.

The Decision Below Would Require Buyers to Restrict Their Bargaining Contrary to the Public Interest.

This case squarely presents the question whether a buyer can accept in silence the lower of two prices competitively offered. If the unprecedented decision below is allowed to stand, a negative answer will ultimately be imposed on all buyers subject to the Robinson-Patman Act unless they can prove cost justification. Yet in this very case, in holding that A&P had not dealt unfairly with Borden, and that

a buyer does not have any duty to disclose the amount of a competing offer, the Commission itself wrote in part:

> "The imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest." (App. C, p. 38a)
>
> "We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid." (App. C, p. 39a)[9]

The Commission therefore rejected the FTC Act charge "based on the same conduct" as the § 2(f) count and similarly alleging a violation of "the policy of the Robinson-Patman Act" (App. A, p. 5a).

Whichever statute is invoked, it would seem just as "contrary to the public interest" to impose on a buyer the duty of either refusing the better offer, or advising the offeror so that he may raise his offer to his competitor's level. In either case, the practical result is lessening competition and stabilizing prices at higher levels. The FTC's ruling that acceptance of the offer in silence violates § 2(f), unless the buyer can prove cost justification, not only negates its § 5 ruling but actually requires buyers to act in a manner the FTC found to be at odds with the public interest.

The court of appeals accepted this "seeming inconsistency" because of its fear, "admittedly the rare case", that

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[9] The Department of Justice's 1977 Report on the Robinson-Patman Act (at pp. 63-64) praised this portion of the FTC's decision as pro-competitive.

if purchasers can choose between competing bids they may induce "predatory price cutting" (App. A, p. 20a). The Commission's concern was precisely the opposite; it wrote:

> "We recognize the need to curb undue pressure on sellers by powerful buyers such as A&P but do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that such a change would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution." (App. C, p. 38a)

We respectfully submit that the Commission's concerns are more realistic and more consistent with *Automatic Canteen*, where this Court stated that expansive enforcement of § 2(f) might "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (346 U.S. at 63). The Court stated in part:

> "putting the buyer at his peril whenever he engages in price bargaining . . . must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated." (346 U.S. at 73-74, footnote omitted)

Similarly, the Department of Justice's Report on the Robinson-Patman Act, issued earlier this year, stated as to § 2f):

> "While this provision [§ 2f] was intended to counteract the power of large buyers to 'coerce' non-justified price discriminations from *smaller* sellers its applicability is general and therefore is restrictive in situations where vigorous bargaining by a buyer is neces-

sary to bring down high prices charged by large oligopolistic manufacturers.

> "It is anomalous that a statute designed to protect small businessmen has the effect of governing the competitive relationships between giant companies for the benefit of those with oligopoly selling power." (*United States Department of Justice Report on the Robinson-Patman Act* 63 (1977, emphasis in original))

It is even more anomalous that "the same conduct" which the Commission found to foster the public interest in aggressive bargaining (App. C, pp. 36a-39a) could be condemned as unlawful in the same opinion (App. C, pp. 39a, *et seq.*).

II.

The Decision Improperly Deprives Buyers of the "Meeting Competition" Defense.

The court below was fully cognizant that it did nothing less than "deprive" A&P of any "meeting competition" defense (App. A, p. 22a). It reached this result by reliance on *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), which until then had not been followed by any other court.[10] But the *Kroger* decision expressly turned on the affirmative misrepresentations of Kroger's buyer as to the existence of competitive offers (438 F.2d at 1377). Thus the *Kroger* decision is simply

[10] *Kroger* was ignored in *Rutledge* v. *Electric Hose and Rubber Co.*, 327 F. Supp. 1267, 1276 (C.D.Cal. 1971), *aff'd*, 511 F.2d 668 (9th Cir. 1975): "since plaintiffs have shown no section 2(a) violation, the [buyer] defendants have not violated § 2(f)" as well as in *Harbor Banana Distributors, Inc.* v. *FTC*, 499 F.2d 395, 399 (5th Cir. 1974): "A prohibited discrimination is a condition precedent to a finding of unlawful conduct under § 2(f)".

a ruling that a buyer may not create a meeting competition defense by intentional misrepresentations as to the existence of a competing offer. Astonishingly, the court below dismissed this distinction between a buyer's lying (in *Kroger*) and telling the truth (in this case) as "a fine one indeed" (App. A, p. 21a).

Not only is *Kroger* clearly inapposite here, but the "rare case" of the predatory buyer which the court below feared (and the *Kroger* court found) can and should be dealt with by the Commission under the more flexible standards of § 5 of the FTC Act, instead of interpreting § 2(f) so that it subjects buyers who engage in competitive shopping to treble damage exposure.

The court of appeals compounded its error by ruling that A&P could not take advantage of the "meeting competition" defense because "A&P knew *for a fact* that the final Borden bid was substantially below 'meeting competition'" (App. A, p. 19a; emphasis in original). As we have seen (p. 7 above), the price differences here were fractions of mills and no more than ⅓ of 1% of the prices Borden offered. In short, A&P could not have known "for a fact" what clearly was not a fact since Borden's offer was at best virtually equivalent to the Bowman offer.

The finding that the Borden bid was lower than Bowman's was based on the testimony of an A&P witness who said that, although "the difference was almost infinitesimal" and "a matter of mills", a comparison he received from Elmer Schmidt made the Borden bid appear to be "substantially better" (App. C, p. 42a). There was never any dispute as to the actual figures set out above or any conflict in the testimony concerning Bowman's offer.

Finally, we need not belabor the point that nothing in the statute puts the buyer in any different position than the

seller in taking advantage of the meeting competition defense of § 2(b).

III.

The Decision Below Conflicts With Other Circuit Court Decisions on "Beating Competition".

To say the least, the FTC order restricting A&P's ability to bargain for lower prices is a drastic remedy for a buyer's harboring the "evil thought" that he was accepting a substantially better offer, even though in fact it was not better. In addition, this result conflicts with the cases which have previously defined the extent of the "meet but do not beat" limitation on the "meeting competition" defense, which the court below invoked.[11]

The only other circuits to address the "meet not beat" principle have upheld the defense even as to a better offer provided that the seller was acting in good faith.[12] These decisions followed the ruling of this Court in *FTC* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945), that a seller need not show that its price only met an equally low competitive price, but merely that there was a good faith attempt to do so. Thus, if a seller can show that it acted fairly, intending only to meet a competitive price, the fact that it actually

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[11] It seems clear that the court would have reached a different result if Borden's final quote had fortuitously exactly met the bid submitted by Bowman down to the last fraction of a mill—a result not within A&P's control and not to be expected in real life.

[12] *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965); *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 726 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Jones* v. *Borden Co.*, 430 F.2d 568 (5th Cir. 1970); *Callaway Mills Co.* v. *FTC*, 362 F.2d 435 (5th Cir. 1966); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).

"beat" the price does not result in loss of this defense.[13] Similarly, a buyer who accepts one of two such closely matched offers should be able to invoke the meeting competition defense.

IV.

This Decision Distorts This Court's Ruling in *Automatic Canteen* by Shifting the Burden of Proving Cost Justification to the Buyer and in Other Respects.

The Commission here repeatedly acknowledged that "there were differences in the way A&P and its competitors were served" which gave rise to cost savings (App. C, pp. 41a, 48a). Yet A&P lost the benefit of the seller's "cost justification" defense in § 2(a) of the Act when the FTC required strict proof on this issue by A&P in direct contravention of this Court's decision in *Automatic Canteen Co. of American* v. *FTC*, 346 U.S. 61 (1953). That case squarely stands for the proposition that where (as here) a buyer is served by different methods or buys in different quantities than his competitors, then in order to prove a § 2(f) charge the *Commission* must show lack of cost justification as well as the buyer's knowledge of that fact; it stated in part:

> "If the methods or quantities differ, the *Commission* must only show that such differences *could not* give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, *and* that the buyer, knowing these were the only differences,

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[13] "An incidental undercutting of the prices quoted by others, when in the course of genuinely meeting one particular competitor's equally low price offer, hence should not invalidate a seller's defense." (*Report of the Attorney General's National Committee to Study the Antitrust Laws* 183 (March 31, 1955))

> should have known that they could not give rise to sufficient cost savings." (346 U.S. at 80, emphasis added)

No such showing was made here.

The decision here conflicts with *Automatic Canteen* not only in its principal holding and underlying competitive philosophy but in other respects as well. This Court started with the premise that it is "apparent that the discriminatory price that buyers are forbidden by § 2(f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act. . ." (346 U.S. at 70); it continued:

> "a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." (346 U.S. at 74)

This Court there advised the FTC that it had "the burden of coming forward with evidence as to costs and the buyer's knowledge thereof" (346 U.S. at 79, footnote omitted), basing that burden not only on "considerations of fairness and convenience" but on "the fact that the buyer does not have the required information, and for good reason should not be required to obtain it" (346 U.S. at 78).[14]

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[14] The decision below recognized its departure from *Automatic Canteen* when it stated:

> "A finding of §2(f) liability, therefore, has been arrived at without a square holding as to the factual absence of cost justification." (App. A, pp. 24a-25a)

A recent commentary on this decision states:

> "It is doubtful that this formulation comports with *Automatic Canteen*." (H. Shniderman, *Price Discrimination in Perspective* 143 (1977))

Instead of following *Automatic Canteen*, the court below ruled that it should not be read to impose any burden of proof on the FTC (App. A, pp. 25a-26a). In this, it relied on *Fred Meyer, Inc.* v. *FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd in part on other grounds*, 390 U.S. 341 (1968). There, Meyer knew that it was purchasing on the same terms and conditions as its competitors and that it was receiving substantial and unique promotional allowances under a Meyer "coupon book" program devised by Meyer itself and not offered to other buyers. The allowances amounted to as much as one-third of the price paid by others and were not based on any cost savings. Since the methods of service and quantities of purchases did not differ between Meyer and its competitors, the ruling in *Automatic Canteen* did not require the Commission to adduce further evidence that cost justification was lacking. The FTC in *Fred Meyer* nevertheless did introduce evidence of lack of cost justification which the court of appeals found "weak but not insufficient" (359 F.2d at 365).[15]

A&P did not and could not have known Borden's costs at the time of its purchases. This was so because Borden (like sellers generally) considers its costs confidential trade secrets; moreover, Borden never commissioned a real cost study of its savings under the new method of delivery to A&P.[16]

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[15] Among the other differences between this case and *Fred Meyer*, it should be noted, is that there was no proof here that A&P knew the prices at which Borden sold to other chain store customers. On the contrary, there was uncontradicted evidence that actual net prices to volume customers were kept secret by Borden and other dairies.

[16] At one point, the court mistakenly refers to a "Borden cost study . . . criticized by A&P" (App. A, pp. 28a-29a). There was no Borden cost study, and none was submitted by the Commission (App. C, p. 51a, fn. 25; App. A, p. 24a). The administrative law judge who presided at the hearing did make an effort to satisfy

A&P did subpoena certain Borden records and employed cost accountants to make cost studies when the complaint issued (over 6 years after the challenged events) and even during the hearings. Although these studies showed substantial cost justification, the FTC rejected them—in part because they were not based on "contemporaneous" observations by accountants familiar with Borden's procedures. This, of course, is an impossible standard for a buyer to meet and is the predictable result of placing the burden of showing cost justification—whether it is described as one of introducing evidence or one of persuasion—on the party least likely to be able to discharge it.

This Court so recognized in *Automatic Canteen* when it specifically referred to the cost justification defense and stated: "Certainly the Commission with its broad power of investigation and subpoena, prior to the filing of a complaint, is on a better footing to obtain this information than the buyer" (346 U.S. at 79). Instead, the FTC delayed six years before issuing this complaint, the hearings were not concluded until 10 years after the events in issue, and yet at no time did the Commission attempt to develop any cost data.

Automatic Canteen's requirements by ruling that certain data prepared by a Borden accountant showed a lack of cost justification. However, the Commission, as noted by the court of appeals, "did not consider those figures as a formal cost study . . ." (App. A, pp. 24a-25a, fn. 11) and refused to credit this data as being accurate.

CONCLUSION

The decision here is fundamentally at odds with the robust bargaining which this Court, in *Automatic Canteen,* perceived as preferable to any mechanistic interpretation of the Robinson-Patman Act. It is also inconsistent with the public interest considerations to which the FTC gave lip service in this same decision, with decisions of other circuit courts, and with the interests of consumers and others in a competitive economy. Accordingly, we respectfully request that this Court issue a writ of certiorari to review the decision below.

Dated: New York, New York
November 7, 1977

Respectfully submitted,

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Appendices

APPENDIX A

Opinion of the Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 922—September Term, 1976.

(Argued March 24, 1977 Decided June 21, 1977.)

Docket No. 76-4179

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Before:

ANDERSON and MESKILL, *Circuit Judges,* and MARKEY, *Chief Judge,* U. S. Court of Customs and Patent Appeals.*

Petition by The Great Atlantic & Pacific Tea Company, Inc., for review of an order of the Federal Trade Commission, based on its determination that petitioner had violated §2(f) of the Robinson-Patman Act (15 U.S.C. §13(f)).

Petition denied and enforcement granted.

* Sitting by designation.

Appendix A—Opinion of the Court

ANDERSON, *Circuit Judge:*

This is a petition for review of an order of the Federal Trade Commission (FTC or the Commission) in the matter of *The Great Atlantic & Pacific Tea Co., Inc.*, —— F.T.C. —— [1973-76 Transfer Binder] CCH Trade Reg. Rep. ¶21,150 (1976) (hereinafter cited as *A & P*). The Commission found that A & P violated §2(f) of the Robinson-Patman Act, as amended, 15 U.S.C. §13(f)[1] by knowingly

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[1] 15 U.S.C. §13(f) provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

15 U.S.C. §§13(a) and (b), provide in pertinent part:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ."

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination. *Provided, however*, That nothing herein contained

inducing or receiving illegal price discriminations from The Borden Company (Borden) in the purchase of "private label" milk in the Chicago area from 1965 through 1972. We deny the petition.

Now in its seventh year of litigation, this case has developed a voluminous record and thorough arguments and briefs by both sides. The Commission has succinctly set out the underlying facts in its extensive opinion, *A & P*, —— F.T.C. at ——, ¶21,150 at 21,039-40. The case arose from A & P's attempt in the mid-1960's to secure savings in its dairy products business by switching from selling "brand label" milk in its stores (*e.g.*, milk sold under the brand name of the supplying dairy) to selling "private label" milk (*e.g.* milk sold under the A & P label). Pursuant to directions from A & P's headquarters in New York, A & P's "Chicago Unit," [2] made up of over 200 A & P stores in northern Illinois, plus about 35 in neighboring portions of northwestern Indiana and a few stores in Iowa, began negotiations with Borden for the supply of A & P private label milk and other dairy products. In August of 1965, Borden submitted a bid, premised on A & P's acceptance of limited delivery service, which Borden claimed would have reduced A & P's annual dairy costs by $410,000. Not content with this offer, A & P sought and received a lower bid from a competing dairy, Bowman Dairy (Bowman).

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shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

[2] A & P states in its Brief in this appeal that its Chicago Unit was one of 32 similar "Units" reporting to seven "Divisions," into which A & P had grouped its over 4,000 retail grocery stores.

Armed with a lower bid, A & P turned its attention back to Borden (contrary to its usual practice, which is to allow only one bid from a supplier, *A & P*, —— F.T.C. at ——, ¶21,150 at 21,039). Elmer Schmidt, A & P's Chicago Unit buyer, telephoned Borden's Chicago chain store sales manager, Gordon Tarr, and told him that Borden's initial offer was not "in the ball park." Pressed for details as to what would be "in the ball park," Schmidt told Tarr that a $50,000 improvement "would not be a drop in the pocket." Borden then had to decide whether to re-bid. At the time, A & P was one of Borden's major customers in the Chicago area. In addition, Borden had just invested over five million dollars in a new dairy processing facility in Woodstock, Illinois; losing the A & P account would have confronted Borden with the inefficient use of the new plant. Ralph Minkler, President of Borden's Chicago Central District, testified before the Administrative Law Judge that he was told by his superiors to "save the [A & P] business." Accordingly, Borden offered to double A & P's expected annual savings under a private label program to $820,000. Minkler emphasized to A & P's Schmidt at the time this second bid was offered that it was being made only to meet the rival Bowman bid and that Borden knew "of no other way to justify this." Before accepting the second and final Borden bid, A & P's Schmidt requested a letter from Borden to the effect that the prices being offered A & P were proportionally available to others. Borden's "availability letter" stated only that it felt its prices were proper under applicable law and that it was prepared to defend them.

The second Borden bid was then reviewed by Herschel Smith, A & P's National Director of Purchases in New York. Smith testified that at the time, he regarded the

second Borden bid as "substantially better" than the Bowman bid. As for Borden's "availability letter," Smith testified that he did not initially understand Borden's letter to mean that other Borden customers could enjoy proportionally lower prices such as those agreed upon with A & P, but that after consultation with a Mr. Archer (who had no recollection of such a discussion) he became convinced that Borden's letter was one of availability for all customers. After review by A & P's legal department, the second and final Borden bid was accepted by A & P. Borden began serving A & P in the Chicago area with private label dairy products in November of 1965.

The above constitute the factual nucleus of the three-count complaint filed against A & P in 1971. Count I charged A & P with misleading Borden in the course of negotiations for the private label contract, in that A & P allegedly failed to inform Borden that its second and final bid had not merely "met", but substantially "beaten," Bowman's competitive bid. Such conduct by A & P was said to constitute a violation of §5 of the Federal Trade Commission Act, 15 U.S.C. §45, along with the policy of the Robinson-Patman Act, 15 U.S.C. §13. Count II, based on the same conduct by A & P, charged a violation of §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f)[3] (knowing inducement or reception by A & P of price discriminations from Borden which are in turn prohibited by §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a)). Finally, Count III charged a combination of A & P and Borden to stabilize and maintain the retail and wholesale prices of milk and other dairy products, contrary to §5 of the Federal Trade Commission Act, 15 U.S.C. §45.

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[3] Quoted in note 1, *supra*.

Following an extended discovery period and hearing, the latter extending over 110 days, the Administrative Law Judge found that as to Count I, A & P "ha[d] acted unfairly and deceptively" in accepting a price offer from Borden offered to meet competition from Bowman Dairy, "when in fact such [a] meeting-competition-defense[4] was not available and without informing Borden of this fact in violation of the policy of Section 2 of the amended Clayton Act [the Robinson-Patman Act] and in violation of Section 5 of the Federal Trade Commission Act." Likewise as to Count II, A & P was found to have violated §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), in knowingly inducing or receiving price discriminations in the purchase of fluid milk and other dairy products. As to Count III, however, which had charged a combination to stabilize and maintain milk prices between A & P and Borden, the Administrative Law Judge held that the FTC had not satisfied its burden of proof. Accordingly, Count III was dismissed.

On review by the Commission, the Administrative Law Judge's holding as to Count I, grounded on A & P's alleged deceptive practices in bargaining with Borden, was reversed. The Commission characterized the charge as "directed to the question of what must legally be disclosed during contract negotiations." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,040. That is, knowing that Borden's final bid was substantially better than Bowman's bid and also knowing that Borden would defend the legality of its bid, if necessary, on the ground that it was merely attempting to meet, but not beat, a competitor's bid from Bowman

[4] The "meeting competition" defense to a charge of price discrimination, as incorporated in 15 U.S.C. §13(b), quoted at note 1, *supra*, is available to both buyers and sellers when charged with violations of the Robinson-Patman Act, 15 U.S.C. §13.

Dairy, A & P refrained from affirmatively disclosing to Borden the terms of Bowman's bid and accepted the Borden offer. The Commission did not agree with the Administrative Law Judge that such behavior constituted an unfair trade practice under the Federal Trade Commission Act, 15 U.S.C. §45, primarily because such a holding would be "contrary to normal business practice and, we think, contrary to the public interest." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,040.

In spite of the above holding as to Count I, the Commission nonetheless affirmed the finding of A & P's liability under §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), ruling that (1) the sales by Borden to A & P had met the statute's jurisdictional requirements that at least one purchase said to involve price discriminations "in commerce"; (2) that the evidence demonstrated the presence of price discriminations, which resulted in competitive injury, *A & P*, —— F.T.C. at ——, ¶21,150 at 21,042-43; and (3) by virtue of its trade experience and common sense, A & P "knew or should have known that it was the beneficiary of a price discrimination having the requisite harmful competitive effects." Id. at ——, ¶21,150 at 21,043.

A & P had interposed two defenses to this charge of illegal price discrimination, the first of which was that it was protected from §2(f) liability through 15 U.S.C. §13(b),[5] which allows a *seller* charged with giving illegally discriminatory prices to rebutt a *prima facie* case by showing that the lower price afforded a purchaser was "made in good faith to meet an equally low price of a competitor." The Supreme Court has ruled in *Automatic Canteen* v.

[5] Quoted in note 1, *supra*.

FTC, 346 U.S. 61, 74 (1953), that a buyer charged under §2(f) is not liable if the prices he induces are either within the "meeting competition" defense of the seller or not known by the buyer not to be within one of those defenses. A & P argued that the final Borden bid had been submitted by Borden in a good faith effort to meet an equally low price of a competitor (here, Bowman Dairy) and A & P was therefore unaware that Borden's bid could not be protected by the seller's "meeting competition" defense. That is, transferring Borden's potential "meeting competition" defense to A & P, the purchaser could not be held liable. Following *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), however, the Commission ruled that:

> "[W]hen a buyer is charged with violating Section 2(f) [15 U.S.C. §13(f)], the price he induces must come within the meeting competition defense not only from the seller's point of view but also from the buyer's." *A & P*, —— F.T.C. at —— , ¶21,150 at 21,043.

The mere fact that had Borden been charged with giving illegal price discriminations under §2(a) (which it was not), it *could* have defended on the ground that its final bid was merely a good faith effort to meet what it believed to be Bowman's competitive bid, was not sufficient in the Commission's view, to absolve A & P of any wrongdoing, because A & P was aware of the price terms of *both* Borden's and Bowman's bids and had concluded in 1965 that Borden had substantially beaten its competitor. Also pursuant to its application of *Kroger, supra*, the Commission further ruled against A & P's contentions that it could not be charged with knowingly inducing or re-

ceiving illegal price discriminations under §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), unless Borden had been found to have given such illegal prices under §2(a) of the same Act, 15 U.S.C. §13(a). *A & P,* —— F.T.C. at ——, ¶21,150 at 21,044.

A & P's second defense was grounded on §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a),[6] which exonerates sellers who give discriminatory prices on goods of like grade and quality if the discriminations are justified by the seller's manufacture, sale or delivery cost savings in servicing one purchaser over another. Much like the "meeting competition" defense, the purchaser may defend here on the alternative grounds that the discriminatory prices induced or received were in fact "cost justified" or that the buyer was unaware of the unavailability of that defense to the seller. *Automatic Canteen, supra,* 346 U.S. at 74; Rowe, *Price Discrimination under the Robinson-Patman Act,* §14.7 at 438 (1962) (hereinafter cited as *Rowe*). Likewise here, A & P was unsuccessful in establishing its "cost justification" defense. The cost study presented by A & P to show the actual cost justification of Borden's prices was found " 'so defective and inadequate as to furnish no evidentiary basis' to justify the price differential that A & P received for private label products on the basis of Borden's cost savings . . . . " *A & P,* —— F.T.C. at ——, ¶21,150 at 21,047-48. As for A & P's knowledge that Borden could not justify its prices, the Commission found that FTC counsel had more than met their "initial burden" of showing such knowledge. This conclusion was buttressed by the facts that Borden had submitted its final offer solely on the basis that it was meeting competition, which put A & P on notice of the probable absence of a Borden cost

[6] Quoted in pertinent part in note 1, *supra.*

justification defense, Borden's failure to furnish A & P with a clear "letter of availability" (stating that A & P's competitors could enjoy the same prices on a proportional basis), Borden's submission of cost data during the negotiations showing that it would either lose money or make a minimal profit on "private label" sales to A & P, as well as A & P's trade experience. Further, the Commission noted that after Borden had begun servicing A & P with both private label and Borden-label dairy products, Borden had tried to increase prices on its products to cover rising container, labor and social security costs. While accepting price increases on Borden-label products, A & P had initially refused a commensurate increase on private label prices, and notwithstanding the fact that the products were of like grade and quality and that Borden's costs for private and brand label dairy products were virtually the same. *A & P*, —— F.T.C. at ——, ¶21,150 at 21,046-47. In short, A & P's "meeting competition" and "cost justification" defenses failed and it was found to have violated §2(f) of the Robinson-Patman Act.

As for the third charge against A & P, combining with Borden to stabilize dairy prices, the Administrative Law Judge's dismissal of the count was affirmed by the Commission, because the evidence presented simply did not support the charge that "A & P ever gave Borden the assurance that A & P would not create a price differential at the retail level." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,049.

Finally, A & P's claim that it was denied due process of law by the Commission's delay in initiating the proceedings was dismissed on the grounds that any delays were reasonably related to the complexity of the case and to A & P's own failure to evince any concern for a speedy

resolution of the matter. The substantive remedy imposed by the Commission was the nationwide distribution of the Commission's order to its milk and dairy products suppliers as well as placing the burden of going forward with a meeting-competition defense in the future on A & P. A & P unsuccessfully challenged the nationwide scope of the distribution order.

On this appeal, then, the sole remaining issue for our consideration is the Commission's holding that A & P violated §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), by knowingly inducing or receiving illegally discriminatory prices from Borden. We first take up briefly A & P's jurisdictional objection, as well as the evidentiary basis for the Commission's conclusion, and then move on to the heart of this appeal, A & P's contention that the FTC misapplied the law with respect to its defenses of "meeting competition" and "cost justification".

A & P's jurisdictional challenge rests on the point that the Robinson-Patman Act prohibits illegal price discriminations only "where either or any of the purchasers involved in such discrimination are *in commerce* . . . ." 15 U.S.C. §13(a) (emphasis added), and upon A & P's assertion that Borden, in the circumstances of this case, was not in interstate commerce. This language has been interpreted recently in *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, 419 U.S. 186 (1974), to require *more* than a showing that the allegedly anticompetitive activities "affect commerce" as is the case with an action under §1 of the Sherman Act, 15 U.S.C. §1. 419 U.S. at 195. *See, Rowe,* §4.9 at 78, *et seq.* In *Gulf Oil, supra,* a private antitrust action including Robinson-Patman charges against various *sellers* of liquid asphalt, the Court ruled that the alleged illegally discriminatory sales must have occurred in the course of the

seller's interstate activities and that at least one of the sales which, when compared with another, gave rise to a price discrimination, must have been made in interstate commerce. 419 U.S. at 195. Applying this test to the situation at hand, where a *buyer* has been charged with inducing or receiving illegally discriminatory prices, the Robinson-Patman Act may be invoked where at least one of the purchases by a buyer engaged in interstate activities, which gave rise to the allegedly illegal price discrimination, was in interstate commerce. In this case, A & P's "Chicago Unit" bought brand and private label milk from Borden for individual A & P stores in both Illinois and Indiana. "[S]ubstantially all of the private label milk sold to A & P came from Borden's Woodstock, Illinois, processing plant. The plant, in turn, acquired approximately 60% of its milk from Wisconsin dairy farmers. *A & P*, —— F.T.C. at ——, ¶21,150 at 21,042. While there is no doubt, then, that A & P milk purchases for the chain's Indiana stores were "in commerce" for Robinson-Patman purposes, the only remaining question is whether the Illinois-based stores' purchases from Borden were interstate transactions as well. The Commission concluded that they were, inasmuch as Borden acquired most of its milk from Wisconsin and the raw milk was not substantially altered, chemically or otherwise, by processing at the Woodstock plant. We agree. Much as in *Foremost Dairies* v. *FTC*, 348 F.2d 674 (5th Cir.), *cert. denied,* 382 U.S. 959 (1965), a prior price discrimination action also involving fluid milk, the milk here passed "in a steady flow from the farms in . . . [Wisconsin] through the . . . [Woodstock, Illinois] processing plant, where it underwent a rather negligible processing operation, which did not change its character appreciably, to the shelves of retail grocery es-

tablishments in . . . [the Chicago area]." 348 F.2d at 677 (footnote omitted.) Accordingly, A & P's milk purchases from Borden in both Illinois and Indiana were "in commerce" for purposes of Robinson-Patman Act jurisdiction,[7] which is thus plainly established.

The next issue is whether the Commission made out a *prima facie* violation of §2(f), 15 U.S.C. §13(f), by showing the knowing inducement or reception by A & P of illegal price discriminations "where the effect of such discrimination[s] may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ." 15 U.S.C. §13(a). The Commission must show *both, i.e.,* that the prices received by A & P from Borden were lower than its competitors and that A & P knew that the prices it received violated §2(a), the provision prohibiting the giving of discriminatory prices by sellers. *American Motor Specialties* v. *FTC,* 278 F.2d 225, 228 (2d Cir.), *cert. denied,*

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[7] A & P's argument that as to products other than fluid milk (*i.e.,* cottage cheese, fortified skim milk, buttermilk, eggnog, onion dip and sour cream) supplied by Borden under the private A & P label, there was no Robinson-Patman jurisdiction is well-based and correct. These products were chemically changed from their origin as raw milk by a variety of processes and additions at Borden's Woodstock plant. *See, i.e., Red Apple Supermarkets, Inc.* v. *Deltown Foods, Inc.,* 419 F. Supp. 1256 (S.D.N.Y. 1976) (New York producer of Light 'n' Lively Milk, which involves blending dried, non-fat milk solids with raw, whole milk and liquid skim milk, cannot be charged with illegal price discrimination under §2(a) of the Robinson-Patman Act based on the fact that some of the raw, whole milk used in the production of Light 'n' Lively originated on Pennsylvania farms); *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.,* 287 F.2d 265 (7th Cir.), *cert. denied,* 368 U.S. 829 (1961) (butterfat used in the manufacture of ice cream, originating in Wisconsin, not sufficient basis to support §2(a) jurisdiction where ice cream was both manufactured and sold in Illinois.)

364 U.S. 884 (1960).[8] In *Automatic Canteen, supra,* the court laid stress on the knowledge requirement of §2(f) proceedings, holding:

> "If the requirement of knowledge in §2(f) has any significant function, it is to indicate that the buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense from the seller, nevertheless proceeded to exert pressure for lower prices." 346 U.S. at 79.

In reviewing this phase of the case, we are limited by the statutory directive that "[t]he findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive." 15 U.S.C. §21(c). Put another way, "[t]he appraisal of the evidence and the inferences to be drawn from it are for the Commission, not the courts." *FTC* v. *A. E. Staley Manufacturing Co.,* 324 U.S. 746, 760 (1945); *FTC* v. *Algoma Lumber Co.,* 291 U.S. 67, 73 (1934); *Foremost Dairies* v. *FTC, supra; Callaghan & Co.* v. *FTC,* 163 F.2d 359, 372 (2d Cir. 1947). Looking, then, at only some of the evidence presented by the Commission, it is clear that a *prima facie* case of illegal price discriminations knowingly induced or received by a buyer was made out. The Administrative Law Judge's thorough initial decision in this case set out the higher prices paid by A & P's competitors for milk substantially identical to that purchased by A & P under the private label agreement

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[8] A similar formulation of the §2(f) *prima facie* case is as follows:

> "Thus, the buyer's prima facie violation arises upon proof that the discriminatory concession in his favor was sizable enough to create competitive injury, and that furthermore the nature of the discrimination placed him on notice of its probable illegality." (Emphasis in original.) Rowe, *Price Discrimination under The Robinson-Patman Act,* §14.7, at 438 (1962).

in the Gary-Hammond and Valparaiso areas of Indiana, resulting in price discriminations ranging from 22.5 per cent to 5.9 per cent.

The conclusion that these substantial discriminations were injurious to competition is supported by A & P's admission that fluid milk is one of the most important commodities carried in retail grocery stores and that milk products are "sometimes used as price leaders which are tagged below the normal market price to draw customers to a store where it is hoped the customer will purchase additional products . . . ." A & P also admitted that profit margins have been "notoriously low" in the retail grocery business. Putting these three factors together, the Administrative Law Judge concluded that if A & P's competitors had received the larger discounts obtained by A & P through the private label agreement, they would have increased their net profits and could have been more competitive with A & P. It is, therefore, clear that there was substantial evidence presented to show a " 'reasonable possibility'," *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 50 (1948); or probability, *Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674, 680-81 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965), of adverse effects on competition.

Turning to the "knowledge" requirement of §2(f), the Administrative Law Judge was guided by *Automatic Canteen's, supra*, requirement that, to make out a *prima facie* case, the Commission must initially show only that A & P knew that the methods by which it was served and the quantities in which it purchased were the same as in the case of its competitors, or, if the methods or quantities differ, "The Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price dif-

ferential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings." 346 U.S. at 80. The purpose of making such a showing is to demonstrate that the discriminatory prices induced or received by the buyer were not justified by lower costs to the seller and were thus prohibited by §2(a) of the Robinson-Patman Act. The evidence here showed that A & P was purchasing Borden-label milk at the same prices charged to its competitors, that A & P was no novice in the dairy industry and had discussed pricing patterns in the Chicago area with Borden officials (facts which went towards showing the buyer's "trade experience" referred to in *Automatic Canteen, supra,* 346 U.S. at 79-80) and that Borden had informed A & P upon making its final and winning bid that it could not justify its prices on other than a "meeting competition" basis. This last statement, ruled the Administrative Law Judge, placed on A & P "the duty to inquire to determine whether its prices were legal," citing *Fred Meyer, Inc.* v. *FTC,* 359 F.2d 351, 365-66 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341 (1968). In addition, there was evidence that Borden had provided A & P with cost data during the private label negotiations showing that Borden would incur losses or gain no more than minimal profits on the private label agreement. Further, A & P had resisted cost increases on both Borden label and A & P label milk, after the initiation of the private label service, finally accepting increases on Borden-label milk and proportionately smaller ones on A & P label milk, even though A & P stores were serviced in exactly the same way as to both private label and Borden-label milk. In short, the evidence as to A & P's knowledge that Borden could not cost justify its prices was plainly substantial and may not be disturbed on this petition for review.

Faced with a *prima facie* case of §2(f) liability, however, the buyer may rebut the charge by resorting to statutory defenses available to sellers. The major defenses are that the lower prices offered were "made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor," 15 U.S.C. §13(b), (the "meeting competition" defense) and that the lower prices made "only due allowance" for cost differences to the seller in servicing a particular customer, 15 U.S.C. §13(a) (the "cost justification" defense). In addition, and primarily to give substance to §2(f)'s requirement that only those illegal prices knowingly induced or received by a buyer can form the basis of buyer liability, the Supreme Court ruled in *Automatic Canteen, supra:*

> "We therefore conclude that a buyer is not liable under §2(f) if the lower prices he induces are *either* within one of the seller's defenses such as the cost justification *or* not known by him not to be within one of those defenses." 346 U.S. at 74. (Emphasis added.)

A & P defended its behavior below by invoking both the "meeting competition" and "cost justification" defenses. As to the first of these we agree with the Commission that A & P could not assert the "meeting competition" defense because in 1965, at the time of the private label negotiations, A & P concluded that Borden's bid was " 'substantially better' " or lower than Bowman's, *A & P,* —— F.T.C. at ——, —— ¶21,150 at 21,044. A & P also argued that a 1973 comparison of the Borden bid with the Bowman bid disclosed Borden's to be higher. The Commission concluded, however, on the basis of substantial evidence, that Bowman's bid was in fact higher than Borden's. *A & P.* —— F.T.C. at ——, ¶21,150 at 21,044. Knowing, therefore,

that Borden's final bid not only met, but substantially bettered Bowman's, A & P accepted the prices in question. The Commission's holding and rationale were to a large extent grounded on *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), another §2(f) proceeding against a retail grocery chain in which the buyer gave false price information to a seller during negotiations for private label milk service, thereby inducing illegal price discriminations. The seller, Beatrice Foods, was absolved of wrongdoing by the Commission because it was in fact responding in good faith to what it believed to be, but which in fact was not, a competitive bid, *Beatrice Foods*, 76 F.T.C. 719 (1969). The buyer, Kroger Co., however, did not escape liability. The Sixth Circuit ruled that Beatrice's absolution from §2(a) liability did not *ipso facto* exonerate Kroger because *Automatic Canteen, supra*, did not warrant such a result and "[t]o hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices." 438 F.2d at 1377. The court went on to rule:

> "In order for the buyer to be sheltered through the exoneration of the seller under Section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer." *Id.*

In support of its petition for review, A & P first argues that under *Automatic Canteen, supra*, it was entitled to a "meeting competition" defense because it had every reason to believe that had Borden been charged with knowingly giving illegally discriminatory prices (it was not, pursuant to the Commission's discretion, *see FTC* v. *Universal-*

Rundle Corp., 387 U.S. 244, 251 (1967)), it could have successfully pled its good faith effort to meet Bowman's allegedly competitive bid. We do not agree. While Borden may well have been *under the impression* that the terms of its final offer merely met the Bowman bid, A & P knew *for a fact* that the final Borden bid was substantially below "meeting competition" and beat the Bowman bid by a good margin. As A & P itself recognizes, the Supreme Court in *Automatic Canteen* interpreted Congress' intent in enacting §2(f) as seeking to reach those buyers who, knowing full well of the little likelihood of a defense for the seller, "nevertheless proceeded to exert pressure for lower prices." 346 U.S. at 79. A & P became one of the buyers Congress was concerned with, when it pressured Borden into a second bid which in fact went beyond the bounds of "meeting competition" and went a long way below it. In short, the Sixth Circuit's rule in *Kroger* that where, in a §2(f) proceeding, the buyer interposes a "meeting competition" defense, the facts must be viewed from the point of view of the buyer as well as that of the seller, is consistent with *Automatic Canteen's supra*, maxim that buyers may induce or receive prices, which sellers can *in fact* offer, consistent with the Robinson-Patman Act. 346 U.S. at 70-71. Here, Borden's final bid was not *in fact* sheltered by the "meeting competition" defense. *See*, Curtis, *Buyer Liability under The Robinson-Patman Act*, 42 ABA Antitrust L.J. 345, 351-2 (1973).

Indeed, to rule otherwise would emasculate *Automatic Canteen, supra*, and the purpose of §2(f) in that large buyers could consistently play one seller off against another to the point where all bids are below sellers' costs and then in reliance upon the sellers' potential good faith and its "meeting competition" defenses, thus vindicate the final

price. Such tactics would ultimately result in the acquisition of increased, and perhaps overwhelming, market power by the large buyer, all to the ultimate competitive detriment of the buyer's competitors. In addition, toleration of such abusive behavior by buyers would, in most cases, favor the largest seller, the ones most able to bear the losses resulting from such a competitive situation, with the further result of ultimate anticompetitive effects among sellers. *See generally, Rowe, supra,* §2.1 at 28. That is, in the situation where the seller is unaware of what the buyer is doing (admittedly the rare case), the seller would, in effect, be engaging in predatory price cutting without his knowledge. While the seller may legally escape §2(a) liability in such a situation because of an assumed "meeting competition" defense, adopting A & P's argument in this case would not be, in the final analysis, in the public interest. As noted by the Supreme Court in *Utah Pie Co.* v. *Continental Baking,* 386 U.S. 685 (1967), a suit under §§1 and 2 of the Sherman Act and §2(a) of the Robinson-Patman Act, "the [Robinson-Patman] Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact." 386 U.S. at 703.

A & P's views regarding the buyer's use of a "meeting competition" defense contrast sharply with the legislative origins of the defense under §2 of the Clayton Act of 1914. Congress was concerned on the one hand with the seller's ability to defend himself against local competition without having to cut prices in all areas where it did business, and on the other with the position of a seller trying to enter a new territory by cutting prices only locally. H. Rep. No. 627, 63rd Cong., 2d Sess., pt. 2, at 2-3 (1914); *Rowe, supra,* §9.1 at 208-9.

A & P goes on to argue, however, that even if we find *Kroger, supra,* persuasive, it should not be followed in this case, because the Kroger Co. had been found to be a "lying buyer" in its negotiations with Beatrice, while in the present controversy, A & P has been exonerated under §5 of the Federal Trade Commission Act, 15 U.S.C. §45, for its behavior during negotiations with Borden. This argument is extended to include the assertion that it is simply inconsistent for the Commission to exonerate A & P from charges of unfair trade practices and still hold it liable for a §2(f) violation. The net effect of this resolution, argues A & P, would be nonetheless to require buyers in the future affirmatively to disclose to a bidder that its bid had not only met, but substantially beaten, that of a competitor. Such a result would allegedly run counter to the public interest in vigorous and competitive price bargaining.

Again we reject these superficially attractive arguments. While *Kroger* did indeed involve a "lying buyer," we do not regard the Sixth Circuit's ruling as strictly limited to the situation where the charged buyer affirmatively lied to the seller. The rule that the "meeting competition" defense must be looked at from the buyer's perspective where the buyer is charged under §2(f) is a salutory and correct one, whether the buyer lies or merely keeps quiet about the nature of the competing bid it has already been offered, for the policy reasons stated *supra.* Further, the line between affirmative misrepresentation, as in *Kroger,* and the present case, where Borden was told it was not "in the ballpark" and that a $50,000 reduction would not be a "drop in the pocket", is a fine one indeed. *Kroger* is, therefore, relevant to the present controversy and its sound reasoning must be applied here.

The seeming inconsistency between a finding of §2(f) liability and exoneration under a charge of unfair trade practices is, in turn, more apparent than real. One commentator recently opined with regard to this very case that "Section 5 [of the Federal Trade Commission Act, 15 U.S.C. §45] should not be used for reaching instances of price discrimination which are covered (either explicitly included or excluded) by the Robinson-Patman Act." Reeves, *Toward a Coherent Antitrust Policy: The Role of Section 5 of the Federal Trade Commission Act in Price Discrimination Regulation,* 16 B.C. Ind. & Comm. L. Rev. 151, 198 (1975).[9] That is, where a §2(f) violation can be made out by sufficient competent evidence, there is neither need nor reason to invoke the Federal Trade Commission Act. While we express no opinion as to when and under what circumstances the Commission may or may not charge a violation of the Federal Trade Commission Act,[10] the point here is that A & P's liability under §2(f) must be independently assessed without regard to any other statute, so that a finding that A & P has not engaged in unfair trade practices does not, *ipso facto,* absolve A & P under §2(f).

We hold that in this case and under these circumstances, the Commission properly deprived A & P of Borden's potential "meeting competition" defense.

Turning then to the "cost justification" defense, it is now settled that a buyer charged under §2(f) may defend

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[9] The Reeves article discusses only the FTC's complaint in the present case and was published prior to the Administrative Law Judge's initial decision in the case.

[10] For an excellent analysis and summary of past and present FTC practice under §5 of the Federal Trade Commission Act, 15 U.S.C. §45, see Rice, *Consumer Transactions,* Ch. 8 (1975).

on the alternative grounds that the prices induced or received were in fact cost justified to the seller or that the buyer did not know or could not reasonably have known that the prices were not cost justified to the seller. *Automatic Canteen, supra,* 346 U.S. at 74. A & P attempted to defend on the first ground of the "cost justification" defense through three cost studies, which purported to show that Borden's final offer was within its costs. The methodology and underlying bases of these studies were analyzed at length by the Administrative Law Judge, who concluded that:

> "A & P's cost justification studies . . . are so defective and inadequate as to furnish no evidentiary basis for justifying A & P's preferential price for private label items on the basis of Borden's savings in cost."

The above conclusion was adopted by the Commission, *A & P,* —— FTC at ——, ¶21,150 at 21,047-48. The A & P studies were flawed in a variety of respects, many of which were attributable to the preparer's unfamiliarity with Borden's operations in the Chicago area. For example, as to delivery costs, the largest single expense item after the direct material costs of dairy products, the Administrative Law Judge excluded A & P's studies because they were originally based on wholesale milk delivery time standards prepared by the management consulting firm of Case & Co., and the underlying data supporting the conclusions reached on these studies was not produced. Further, the computation of Borden's processing costs at its Woodstock, Illinois facility was likewise flawed; instead of computing those costs directly, A & P's cost analyst first determined "unit cost" at Borden's two Wisconsin dairies and then

multiplied by the number of units produced at the Woodstock plant to arrive at total Woodstock cost, assuming Wisconsin unit costs. The final figure was adjusted to reflect the fact that the Woodstock plant had higher labor costs but lower non-labor costs than the Wisconsin plants. The Commission agreed with the Administrative Law Judge that such a roundabout method of cost computation was not "reliable."

A & P nonetheless argues that the Commission acted improperly in rejecting its cost studies, in that they were made in good faith and in accordance with sound accounting principles, entitling them to "a very great weight." *Minneapolis-Honeywell Regulatory Co.*, 44 F.T.C. 351, 394 (1948). While it is, of course, true that a cost study will not be invalidated merely because one method of computation was used over another, *FTC* v. *Standard Motor Products Inc.*, 371 F.2d 613, 622 (2d Cir. 1967), for to do so would be to place unfair strictures on the party preparing the cost study where one method of computation is as fair and accurate as the next, the problems with the instant studies are that they were at some points internally inconsistent and at others simply inaccurate, *A & P*, —— F.T.C. at ——, ¶21,150 at 21,048. The net result of A & P's efforts could not, therefore, be relied on.

Thus, A & P was unsuccessful in showing that Borden's final prices for private label milk were cost justified in fact, the first ground of the "cost justification" defense. On the other hand, the Commission did not itself submit a cost study to show the absence of cost justification.[11] A

[11] The only other evidentiary material as regards cost justification was the Borden figures disclosed by Joseph Malone, which indicated that Borden would either lose money or make minimal profits on the A & P private label arrangement. The Commission did not

finding of §2(f) liability, therefore, has been arrived at without a square holding as to the factual absence of cost justification. This seemingly anomalous situation is naturally seized upon by A & P, which argues that the Commission's decision "stand[s] *Automatic Canteen* on its head" by assuming that the FTC "can show that the buyer was 'reasonably aware' that the prices were not cost justified without showing that they were in fact, not cost justified." Our reading of *Automatic Canteen, supra,* does not, however, support the proposition that the Commission must, in all cases, show as part of its *prima facie* case that the prices induced or received by the buyer were not in fact cost justified.

In *Automatic Canteen, supra,* the Court rejected the FTC's contention that a *prima facie* case of §2(f) liability was made out where price differentials were shown and where the buyer knew "only that the prices are lower than those offered other buyers." 346 at 71. In giving content to the §2(f) requirement that the prices induced or received by the buyer must be knowingly in violation of §2(a), however, the Court refrained from the opposite, and equally extreme, position, namely that the Commission must always prove the absence of cost justification in fact. Charting, instead, a middle course based both on

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consider those figures as a formal cost study, however, *A & P,* —— F.T.C. at ——, n. 25, ¶21,150 at 21,046 n. 25, and took them into account only as they served to demonstrate A & P's knowledge of the probability of a lack of cost justification: "Although the [Malone] data may not be completely accurate, it demonstrates that A & P at least had knowledge that the discounts could drastically affect Borden's profits, and therefore, A & P should have inquired whether the prices were available to others. See *Fred Meyer, Inc.* v. *FTC, supra,* 359 F.2d at 365-67." *A & P,* —— F.T.C. at ——, ¶21,150 at 21,046. (Footnote omitted.)

the statutory requirement of knowledge and on the difficulties of proof as regards cost justification, 346 U.S. at 79, the Court required the FTC henceforth to go forward with some evidence that the buyer knew that the discriminatory prices it was receiving could not be cost justified, including but not limited to, the buyer's trade experience in a particular situation. 346 U.S. at 79-80. See Galanti, *Buyer Liability for Inducing or Receiving Discriminatory Prices, Terms, and Promotional Allowances: Caveat Emptor in the 1970's,* 7 Ind. L. Rev. 962, 989-90 (1974). Consistent with its view that "[e]nforcement of the provisions of §2(f) against such a buyer should not be difficult," 346 U.S. at 79, however, the Court made no mention of a requirement that the FTC show the absence of cost justification in fact through its own cost study.

This is not the first time that an argument similar to A & P's has been advanced. In *Fred Meyer, Inc.* v. *FTC,* 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341 (1968), the Commission's first §2(f) proceeding against an individual buyer since *Automatic Canteen, supra;* Note, *The Evolving Duty of an Innocent Buyer to Inquire into His Bargain under Section 2(F) of The Robinson-Patman Act,* 49 Ind. L.J. 348, 357 (1974), an operator of a chain of 13 retail supermarkets was charged under §2(f) as a result of a promotional scheme which involved a "coupon book." Each coupon entitled the purchaser to a price reduction on a particular product. Advertisers in the book paid a flat fee per coupon page and otherwise underwrote the promotion by volume-based reductions, replacing goods sold or redeeming coupons in cash at an agreed rate. 359 F.2d at 356. The Ninth Circuit ruled that in showing the buyer's knowledge that the price differentials resulting from the coupon promotion

could not be cost justified, the FTC had carried its burden by adducing evidence that none of the sellers involved granted quantity discounts, that Meyer itself paid the "going price" of the goods during the 11 months of the year in which there was no promotion and that during the non-promotion months, Meyer paid the same price for the goods as did its competitors. In addition,

> "[t]hat the Commission did not prove the costs of the suppliers is immaterial. Costs surveys are expensive and labyrinthine proceedings whose results are often dependent upon the cost accounting theory used. To require them in all proceedings, even against buyers, would too often be an exercise in futility. At least when the facts and the inferences to be drawn are as clear as they are on this point, we think the method of proof adopted by the Commission here is appropriate to its end, that of showing that the buyer 'is not *an unsuspecting recipient* of prohibited discriminations,' *Automatic Canteen,* 346 U.S. at 81, 73 S. Ct. at 1028. (Emphasis added.)" 359 F.2d at 364.

The above considerations are directly relevant to the present case, where the Commission showed, through substantial evidence (as summarized, *supra*) that A & P knew or reasonably should have known that the final price concessions it received from Borden were not cost justified. To here require the Commission to submit a formal cost study or other cost-measuring analysis, in addition to the testimony and other evidence it has already adduced, would go far towards foreclosing the possibility of a §2(f) proceeding even where all significant indications and factors point to the absence of cost justification and the likelihood of illegal price discriminations. Our result is, therefore,

consistent with *Automatic Canteen's* concern with the "balance of convenience" in going forward with evidence in §2(f) cases, 346 U.S. at 74, as well as with the public interest in the enforcement of §2(f).

Having failed in showing actual cost justification, A & P was thus reduced to defending the §2(f) charge through a showing that it did not know, nor had any reason to know, that Borden's prices could not be cost justified. We have already ruled that the Commission established a *prima facie* showing of A & P's knowledge that the prices in question were *not* cost justified, consistent with its burden of proof on the issue, *Beatrice Foods Co., supra,* 76 F.T.C. at 820; *Suburban Propane Gas Corp.,* 73 F.T.C. 1269, 1274-75 (1968), and thus may be brief in discussing A & P's arguments on this appeal. As set out in the Commission's opinion, A & P's major evidentiary rebuttals to the FTC's *prima facie* showing of knowledge were first, that Borden's letter to A & P after the conclusion of the private label negotiations in which Borden asserted that its prices were "proper under applicable law" and that it was prepared to defend them, was interpreted by A & P to mean that other supermarkets could enjoy the same low prices offered to A & P on a proportionately equal basis. The Commission concluded, however, that the Borden letter did not constitute the "customary assurances" of proportional price availability which led to the reasonable inferences that the prices were not generally available and not cost justified, *A & P,* —— F.T.C. at —— , ¶21,150 at 21,046. Such reasonable inferences may not be disturbed on appeal, *FTC* v. *A. E. Staley Manufacturing Co., supra,* 324 U.S. at 760. Secondly, the Borden cost study prepared at the time of the private label negotiations and submitted to A & P, which purported to show losses or minimal profits

by Borden as a result of private label service, was criticized by A & P as not "completely reliable," *A & P*, —— F.T.C. at ——, ¶21,150 at 21,047. Again, while one view of this Borden study is that it was "salesman's talk," designed to impress A & P with the bargain it was being offered, an equally reasonable view, given that A & P did not contemporaneously criticize the study, is that A & P knew as well as Borden of the illegality of the bargain. Thirdly, in evaluating the reasonableness of Borden's bid, A & P's Smith used a "2-2-2 formula," which reflects the general proposition that "a dairy can profitably sell milk for approximately six cents more per quart than the dairy's cost for raw milk." [12] *A & P*, —— F.T.C. at —— , ¶21,150 at 21,047 (footnote omitted). The Commission concluded that while the use of the formula was relevant to the issue of knowledge, it did not fully rebut the FTC's *prima facie* showing of knowledge.

As to the Commission's *prima facie* showing, A & P makes a variety of arguments, the thrust of which is that the evidence submitted as probative of A & P's knowledge of illegal price discriminations could be easily explained as resulting from quite different factors and motivations. By way of example, the Commission found that after the commencement of private label service in 1975, Borden charged A & P two different prices for private label and Borden-label dairy products, even though, except for a small amount devoted to advertising Borden-label products, there was "no difference in the cost to Borden of private and branded products." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,047. From these facts, among others, the Commission inferred that A & P knew that any differences

[12] Two cents each are allocated for cartons, plant costs and profits, and delivery costs.

in service were not cost justified. A & P now argues that "[t]he mere fact that Borden's prices to A & P for branded milk (delivered under similar conditions) were higher than for private label should perhaps have made A & P suspicious that the brand label prices were too high, rather than the private label prices were too low." Such an argument essentially invites us to retry the facts and draw new inferences in this case, which we may not do. *FTC* v. *A. E. Staley Manufacturing Co., supra,* 324 U.S. at 760. A & P's evidentiary and legal arguments as to the "cost justification" defense in support of its petition for review are unpersuasive.

We come to the last ground of the petition, namely that the Commission's final order was unnecessary and unduly broad. The order provided that in the future, A & P bear the burden of going forward with the "meeting competition" defense and also decreed the nationwide distribution of the order to A & P's operating divisions, as well as its suppliers of milk and other dairy products. Our scope of review is here limited by the principles that Congress has placed the primary responsibility for fashioning orders upon the Commission, *FTC* v. *National Lead Co.,* 352 U.S. 419, 429 (1957), and that the courts should not "lightly modify" the Commission's orders, *FTC* v. *Cement Institute,* 333 U.S. 683, 726 (1948). *See also, FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965); *Fedders Corp.* v. *FTC,* 529 F.2d 1398, 1401-2 (2d Cir.), *cert. denied,* —— U.S. —— (1976). In addition the Commission has been consistently granted "wide discretion" in choosing a remedy "deemed adequate to cope with the unlawful practices" involved. *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 611 (1946); *FTC* v. *Mandel Bros.,* 359 U.S. 385, 392 (1959); *Fedders Corp.* v. *FTC, supra,* 529 F.2d at 1401.

With the above in mind, we first take up A & P's argument that the order was in any event unnecessary because A & P voluntarily terminated its private label arrangement with Borden in February of 1972, four months after the issuance of the complaint in this proceeding and over five years ago to date. While it may be true that a long delay in the proceedings, accompanied by significant changes in the market upon which the Commission's order will act, may be sufficient to warrant the remand of a case to the Commission for further evidence as to the present structure of the relevant market, *Columbia Broadcasting System, Inc.* v. *FTC,* 414 F.2d 974, 981-82 (7th Cir. 1969), *cert. denied,* 397 U.S. 907 (1970), the Commission here found that "[t]he dairy and retail food industries have not drastically changed in the last few years." *A & P,* —— F.T.C. at ——, ¶21,150 at 21,052. Further, in *Fedders Corp.* v. *FTC, supra,* a proceeding under §5(a) of the Federal Trade Commission Act, 15 U.S.C. §45(a), resulting from advertising misrepresentations, the petitioner had discontinued the unlawful activities *prior* to the filing of the Commission's complaint and had given written assurances that it would not resume them. Nonetheless, this court ruled that these factors would not bar a cease-and-desist order "where the public interest otherwise requires it. *Diener's Inc.* v. *FTC,* 161 U.S.App. D. C. 213, 494, F.2d 1132, 1133 (1974) (per curiam); *Cotherman* v. *FTC,* 417 F.2d 587, 595 (5th Cir. 1969); *Libby-Owens-Ford Glass Co.* v. *FTC,* 352 F.2d 415, 418 (6th Cir. 1965)." 529 F.2d at 1403. Here, of course, the A & P-Borden private label arrangement was abandoned only *after* the filing of the FTC complaint, while the lengthy time span between the filing of the complaint and our review is, in large part, attributable to the complexity of the case as well as the

inability of both parties to move this matter along. More important, milk continues to be a major product line for supermarkets while private label milk is commonly carried on the shelves of large supermarkets. As a result, it is clearly in the public interest to enforce the Commission's order.

As to the nationwide scope of the order, A & P argues that the evidence did not show that any A & P officer or employee at the division level or above was "guilty" of even the innocuous conduct alleged in the complaint, so that the order should be limited to A & P's "Chicago Unit." The fact remains, however, that the private label program was initiated by A & P's national headquarters in New York, and A & P's national director of purchases had a direct hand in accepting the final Borden bid here in question. In light of these factors, we cannot say that the Commission abused its "wide discretion," *Jacob Siegel Co.* v. *FTC, supra,* 327 U.S. at 611, in decreeing the nationwide distribution of the order.

It is also urged that the Commission's order providing that henceforth, A & P must carry the burden of going forward with a "meeting competition" defense is improper in that it shifts the burden of proof from the Commission to the petitioner. By its very terms, however, the order does not affect the burden of proof but only the burden of going forward, a distinction highlighted in *Automatic Canteen, supra. See, Rowe, supra,* §14.7 at 441. In a §2(f) proceeding, the Commission must continue to carry the burden of proving the knowing inducement or receipt of illegally discriminatory prices.

The petition for review is hereby denied, and enforcement of the order is granted.

APPENDIX B

Order on Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of August, one thousand nine hundred and seventy-seven.

Present:

HON. THOMAS J. MESKILL,
HON. ROBERT P. ANDERSON,
Circuit Judges,

HON. HOWARD T. MARKEY,
U.S. Customs & Patent Appeals Judge;

Docket No. 76-4179

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.,
Petitioner,

v.

THE FEDERAL TRADE COMMISSION,
Respondent.

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk

by /s/ SARA PIOVIA,
Deputy Clerk

Appendix B—Order on Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of August, one thousand nine hundred and seventy-seven.

76-4179

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.,

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THE FEDERAL TRADE COMMISSION,

Respondent.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Petitioner, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN
Chief Judge

APPENDIX C

Opinion of the Commission

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
Stephen Nye

DOCKET No. 8866

In the Matter of

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a corporation, and BORDEN, INC., a corporation.

By NYE, *Commissioner:*

* * *

I. FACTUAL BACKGROUND

Although the record in this case is voluminous, exceeding 20,000 pages, the facts are generally not disputed. All of the violations alleged in this action concern the events surrounding a November 1, 1965 agreement between A&P and Borden * * *

Thereafter, on August 31, 1965, A&P received an offer from Bowman Dairy (CX 50) that was lower than Borden's August 13 offer (*See* CX 65A; A&P's Proposed Findings

at 121-122).[2] On or about September 1, 1965, Elmer Schmidt, A&P's Chicago unit buyer, telephoned Gordon Tarr, Borden's Chicago chain store sales manager, and stated, "I have a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ball park." (Tr. 873). Although Tarr asked Schmidt for some details, Schmidt said that he could not tell Tarr anything except that a $50,000 improvement in Borden's bid "would not be a drop in the pocket." (Tr. 874-875; *see* CX 53A-B). Contrary to its usual practice, A&P then offered Borden the opportunity to submit another bid (Tr. 1248-1249, 1892-1893).

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II. Count I: Failing to Inform

Count I charged that A&P violated Section 5 of the F.T.C. Act as well as the policy of Section 2 of the Robinson-Patman Act by misleading Borden during negotiations concerning the sale by Borden of milk and other dairy products to A&P. The thrust of the charge is that A&P failed to inform Borden that Borden's offer, made in an attempt to meet a competitive bid received by A&P from another potential supplier, was substantially lower than that of the only other bidder. The count is directed to the question of what must legally be disclosed during contract negotiations.

We briefly state the relevant facts. A&P compared the Bowman bid with Borden's and concluded that Borden's bid was [6] substantially lower. Also, A&P knew that Borden was relying on the meeting competition defense (Tr. 248, 886, 1789, 1792, 1801). Finally, A&P accepted Borden's

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[2] Contrary to Judge Hinkes' conclusion (I.D. 103, 106-07, 114), we find that the Bowman bid was operative and could be compared to the Borden offer.

bid without telling Borden that Borden substantially "beat" Bowman's bid as it clearly had (Tr. 1413; CX 71, 263; *see* Answer at 42). Because A&P did not then inform Borden that the meeting competition defense was unavailable, Judge Hinkes concluded that A&P engaged in an "unfair" practice that violated Section 5 of the F.T.C. Act (I.D. 115, 116).[5]

At the outset we emphasize our belief that Section 5 of the F.T.C. Act can reach actions that violate the policy of the Robinson-Patman Act, *cf. FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972), and, further, that Section 5 should be used to fill the gap in coverage caused by the manner in which Congress added the buyer liability provision contained in Section 2(f) of the Robinson-Patman Act.[6] It is well established that Section 5 can reach buyers who induce violations of the promotional allowance and payment for services provisions of the Robinson-Patman Act. *Fred Meyer, Inc.* v. *FTC*, 359 [7] F.2d 351, 367 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968); *Giant Food Inc.* v. *FTC*, 307 F.2d 184, 186 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963); *Grand Union Co.* v. *FTC*, 300 F.2d 92, 98-99 (2d Cir. 1962). According to the Court in *Grand Union*, the application of Section 5 to buyers who violate specific provisions of the Robinson-Patman Act neither offends Congressional policies nor circumvents the criteria of illegality prescribed by the Robinson-Patman

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[5] Although A&P made certain misrepresentations, *see* note 3, *supra*, such misrepresentations are not relevant to the charge.

[6] "Although Robinson-Patman Act prohibitions were predominantly directed at discriminatory concessions coerced by powerful buyers, the legislative process relegated Section 2(f) to a minor role * * * Section 2(f) first emerged as an amendment offered in debate on the floor of the Senate * * * and represented a last minute afterthought addition." Att'y Gen.'s Nat'l Comm. to Study the Antitrust Laws, Report 193 (1955) (hereinafter "Report").

Act. *Id.* at 98. In addition, it is appropriate to use Section 5 to fence in activities which, if permitted to mature, could violate the antitrust laws, including the Robinson-Patman Act, or which otherwise violate the policy of the antitrust laws. *Id.* at 99.

Having recognized this, however, and having measured A&P's conduct against these standards, we do not think that a violation of Section 5 has occurred here. The imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest. As the Court in *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965), stated in describing normal practice:

> The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place.

[8] We recognize the need to curb undue pressure on sellers by powerful buyers such as A&P but do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that such a change would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution. As the Attorney General's National Committee to Study the Antitrust Laws stated, "Legalistic impediments to the normal bargaining process * * * might well deprive the public of gains that under effective competition it has a right to expect." Report, *supra* note 6, at

196. We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid. We do not believe that the failure of buyers to engage in such disclosure should violate the F.T.C. Act.[7] Therefore, Count I should be dismissed. [9]

III. Count II: Knowingly Inducing or Receiving Discriminations in Price

Count II charged that A&P violated Section 2(f) of the Robinson-Patman Act by knowingly inducing or receiving discriminations in the price of milk and other dairy products from Borden, which discriminations are prohibited by Section 2(a) of that Act.[8]

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[7] We are not concluding that nondisclosure during commercial bargaining never rises to a Section 5 offense. We simply hold that it should not be A&P's responsibility to tell Borden whether a legal defense is available. As discussed at p. 20 n. 19, a seller's good faith meeting competition defense under the Robinson-Patman Act is dependent on some factors that are more readily available to him than to the buyer. For example, to have a meeting competition defense, the seller who has knowingly discriminated in price must show that he acted prudently in surmising whether his bid, in fact, met the equally low price of a competitor. *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945); *Viviano Macaroni Co.* v. *FTC*, 411 F.2d 255, 257-58 (3d Cir. 1969).

[8] Section 2(f) reads:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 2(a) reads in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly,

Section 2(f) was enacted to make the prohibitions of price discrimination applicable to buyers. *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 70 (1953). In order to [10] prove a violation of Section 2(f), complaint counsel must not only establish all elements of a Section 2(a) violation, but must also meet special requirements with respect to showing the respondent's "knowledge." Further, the buyer is entitled to raise any defenses that the seller might have raised, specifically those listed in Sections 2(a) and 2(b).[9]

A&P admits that the A&P-Borden transaction contained many of the elements of a Section 2(a) offense. It argues, however, that the sales in Illinois were not "in commerce" and that A&P did not receive a discriminatory price that caused competitive injury. In addition, A&P asserts that complaint counsel failed to establish (1) that the price quoted by Borden was not made to meet a competitive bid and was not cost justified and (2) that A&P knew that the price received was not covered by one of those defenses.

We find that A&P has violated Section 2(f) and reject its proffered arguments.

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to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition * * * or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

[9] Section 2(b) reads in pertinent part:

* * * nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *.

We agree with Judge Hinkes' findings (I.D. 62-88; 118-123) that the relevant comparisons demonstrate the existence of discriminations in price. We note that a price comparison does not have to include the full line of dairy products nor A&P's purchases of Borden brand products. We faced and dismissed this same argument in *Beatrice Foods Co.*, 76 F.T.C. 719, 806 (1969), *aff'd sub nom., Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). Specifically, the price of private label milk and other dairy products sold to A&P may validly be compared with Borden's sales of such items to other groceries to ascertain whether [14] discrimination took place. The *Kroger* Court stressed "the competitive advantage which results when disadvantaged competitors are denied a [private] label which the favored buyer receives." 438 F.2d at 1379. In addition, although there were differences in the way A&P and its competitors were served, the distinctions were often minimal and, in any event, are more properly considered in connection with the cost justification defense.

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c. *Meeting Competition*

A seller who has discriminated in price is guiltless under the Robinson-Patman Act if the lower price was offered in good faith to meet an equally low price of a competitor. 15 U.S.C. § 13(b). The Supreme Court has stated that the buyer is not liable under Section 2(f) if the lower price he induces is within the meeting competition defense or if the buyer is unaware that the price cannot be protected by that defense. *Automatic Canteen Co.* v. *FTC, supra*, 346 U.S. at 74. The Court in *Kroger Co.* v. *FTC, supra*, 438 F.2d at 1377, noted that when a buyer is charged with violating Section 2(f), the price he induces must come within

the meeting competition defense not only from the seller's point of view but also from the buyer's. This is consistent with the Supreme Court's statement concerning the burden of going forward in a Section 2(f) case:

> [18] Our view that § 2(b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the seller's price was made to meet a competing seller's offer to a buyer charged under § 2(f) might be available to a buyer more readily even than to a seller. *Automatic Canteen* v. *FTC, supra,* 346 U.S. at 79 n. 23.

Specifically, proof that the seller did not act in good faith is unnecessary to a finding that a buyer cannot assert the meeting competition defense.

In its reply brief, A&P argues that its contemporaneous comparison of the Bowman and the last Borden bid is not relevant (Reply at 35). We disagree. The comparisons demonstrate whether A&P acted in good faith. For example, if the Borden bid *"beat"* the Bowman bid yet A&P contemporaneously reasonably believed that it only *met* the bid, we believe A&P (as well as Borden, if Borden prudently reached the same conclusion) could assert the meeting competition defense. *See FTC* v. *A.E. Staley Mfg. Co.,* 324 U.S. 746, 759-60 (1945).[16] However, we conclude that A&P contemporaneously concluded that Borden's bid was "substantially better" than Bowman's (Tr. 1413-1414, 1896-1897; CX 263), and A&P, therefore, cannot assert the seller's meeting competition defense.

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[16] A&P argued that in this case, it contemporaneously believed that Borden's bid beat Bowman's but after "properly" comparing the bids, Bowman's bid, in fact, beat Borden's (Appeal at 31-33).

We assume, *arguendo,* that A&P can assert the defense if the Borden bid did, in fact, happen only to meet the Bowman bid. [19] However, while we believe that the Bowman bid was comparable and operative,[17] we conclude that the Borden bid was substantially better than the Bowman bid. Specifically, we find that prior to adjusting the Bowman bid to make it reflect such items as A&P's true volume requirements and delivery requirements, Borden's bid substantially beat Bowman's (*See* CX 263B; Compare CX 75 F-J with CX 50). In addition, after adjusting the Bowman bid to make it responsive to A&P's true situation, Borden's bid beats Bowman's by an even greater amount. Bowman would not be able to give A&P such a low price because A&P's volume was less than the $1 million per month stipulated in the Bowman offer (*See* citations in I.D. 106) and because Bowman would have to increase the days of delivery in the Gary-Hammond area (*See* citations in I.D. 107).[18]

Finally, A&P argues that because Borden has not been found in violation of Section 2(a), A&P cannot be charged under Section 2(f). In other words, A&P asserts that Borden must be convicted of a Section 2(a) violation prior to or at the same time as A&P is found in violation of Section 2(f). In developing this argument, A&P claims that complaint counsel's case against A&P is premised on Borden's having a valid meeting [20] competition defense, and that therefore, Borden would be absolved from any Section 2(a) charge. We reject the argument.

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[17] Specifically, we reverse Judge Hinkes' conclusion to the contrary (*See* FF 103, 106-07, 114).

[18] The difference in stipulated butterfat content would not greatly change the difference in prices. Contrary to A&P's study, Borden's butterfat level was probably about 3.45 percent (Tr. 5513), and the Bowman bid may not have called for 3.5 percent (Tr. 5450-5453, 5461, 6187-6188; *see* I.D. 129).

Appendix C—Opinion of the Commission

The Commission alone establishes the enforcement policy which will best accomplish the ends contemplated by Congress. *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *See Jewel Companies, Inc.* v. *FTC*, 432.F.2d 1155, 1160 (7th Cir. 1970). In deciding to issue a complaint against A&P charging a violation of Section 2(f), the Commission concluded that A&P's conduct was egregious enough to warrant such action. It did not follow that the Commission condones Borden's behavior. In addition, as complaint counsel notes (Answer at 50), A&P was the "principal malefactor" in the negotiations with Borden. It placed the pressure on Borden, not *vice versa*. Although the Commission decided not to issue a complaint against Borden for violation of Section 2(a), the Commission has not concluded that Borden would have a valid meeting competition defense to such a charge.[19]

[21] Furthermore, even though a seller has a defense to a Robinson-Patman Act charge, a buyer can still violate Section 2(f). The court in *Kroger Co.* v. *FTC*, *supra*, found

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[19] Judge Hinkes did not reach the question of whether Borden had a meeting competition defense (*see* I.D. 166). We believe that it is very probable that Borden did *not* have such a defense. To have a meeting competition defense, the record must demonstrate the existence of facts which would lead a reasonable and prudent person to conclude that the lower price would, in fact, meet the competitor's price. *FTC* v. *A. E. Staley Mfg. Co.*, *supra*, 324 U.S. at 759-760; *Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 534 (5th Cir. 1973). As noted, Borden had serious doubts concerning whether the competing bid was legal. Specifically, it believed that the other bid only considered direct costs (Tr. 237-239, 376-77, 878, 961-62). It should have asked A&P for more information about the competing bid. By not making the request, it was not acting prudently. *See Standard Oil Co.* v. *Brown*, 238 F.2d 54, 58 (5th Cir. 1956); F. Rowe, Price Discrimination under the Robinson-Patman Act 226 (1962). As the record clearly indicates, A&P had knowledge of Borden's belief that other dairies might submit bids that did not include all costs (Tr. 213-214, 872-873, 955).

that the buyer lied to the seller about the details of a competing bid, 438 F.2d at 1375-1376, and that the seller had no way of knowing that the buyer had lied. Therefore, in submitting the second bid, the seller had a meeting competition defense within the meaning of Section 2(b). However, this defense did not exonerate the buyer who knew that the bid was, in fact, not within the defense. "To hold otherwise * * * would put a premium on the buyer's artifice and cunning in inducing discriminatory prices [and] would violate the purposes of the Act, and frustrate the intent of the Congress." *Id.* at 1377.

d. *Cost Justification*

A seller who charges different prices is exonerated if the differences are justified by a savings in cost. 15 U.S.C. § 13(a). As in the case of meeting competition, a buyer is not liable under Section 2(f) if the lower price he induces is within the cost justification defense or if the buyer is unaware that the price is not protected by that defense.

[22] The parties and Judge Hinkes disagree as to who has the burden of proof in demonstrating whether the cost justification defense is available (I.D. 134; Answer at 66-68; Reply at 48-49). A&P and Judge Hinkes are mistaken in concluding that the *Automatic Canteen* case dealt with the burden of proof issue. Rather, the Supreme Court stated twice that it was deciding only who had the burden of first coming forward with probative evidence. 346 U.S. at 65, 82. In promulgating its rule of "fairness and convenience," *id.* at 78, the Court determined that the Commission did not satisfy this burden by showing only that the buyer had knowledge of a price differential.[20] Rather, the

[20] In *Automatic Canteen,* the Commission only established that the buyer had obtained prices as much as one-third below its competitors.

Commission must present evidence to demonstrate that the buyer was reasonably aware that the price differential could not be cost justified. *Id.*, at 78-80.

The Court believed, however, that the burden of showing this knowledge "should not be difficult." *Id.* at 79. As an example of the evidence which would satisfy this burden in a situation where methods of services and quantities delivered differ, the Court held that the Commission "must only show" that the differences could not give rise to sufficient cost savings and that the buyer, knowing that these were the only differences, should have known that the differences were not [23] cost justified. *Id.* at 80. The Court emphasized that it would not attempt to illustrate "what other circumstances can be shown to indicate knowledge on the buyer's part that the prices cannot be justified," *id.* at 80, concluding that the Commission should do this.[21] *Id.* at 80-81; *accord, Suburban Propane Gas Corp.*, 73 F.T.C. 1269, 1272-1274 (1968) (interlocutory order); 16D J. von Kalinowski, Business Organizations: Antitrust Laws and Trade Regulation §§ 36.05[2]-36.05[3] (1971).

We have described on several occasions how complaint counsel can successfully meet the burden of going forward with the evidence where a favored buyer purchases in quantities or under methods differing from those accorded to disfavored buyers:

> [I]f complaint counsel show such facts and circumstances as would have given the buyer reason to believe, based on the knowledge available to him, including knowledge of the methods of doing business in

[21] The Commission has frequently decided what circumstances demonstrate that a buyer had the requisite knowledge. *E.g., Mid-South Distributors* v. *FTC*, 287 F.2d 512, 518-19 n. 15 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961).

> the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him, they would have met their initial burden. *Beatrice Foods Co., supra,* 76 F.T.C. at 820, *quoting Suburban Propane Gas Corp.,* 71 F.T.C. 1695, 1699 n. 2 (1967) (interlocutory order).

We reiterate what we said in *Suburban Propane Gas Corp., supra,* 73 F.T.C. at 1273—the burden of establishing a *prima facie* case or first going forward with the evidence may [24] be satisfied without introducing a formal cost study showing that the lower prices were not, in fact, cost justified. The Court of Appeals for the Sixth Circuit has affirmed our use of this rule. *Kroger Co.* v. *FTC, supra,* 438 F.2d at 1378.

Once complaint counsel has satisfied their initial burden, the buyer must demonstrate that it did not know or could not reasonably have known that the price differential was not cost justified. If it fails to prove lack of knowledge, it must show that the price differential was, in fact, cost justified. *See Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 74. Therefore, if the buyer establishes that it neither had nor should be charged with such knowledge, the buyer does not have to submit any cost justification study. However, if the buyer cannot establish the requisite lack of knowledge, it must submit a cost study if it wishes to prevail, which study generally will be held to the same standard as are cost studies offered by sellers. In other words, it is possible for the buyer to be unable to respond adequately to complaint counsel's evidence demonstrating knowledge yet be able to demonstrate that, in fact, the price differential was cost justified. Unlike the meeting compe-

tition defense, one does not need to demonstrate good faith in proving cost justification. Therefore, it is completely permissible to receive in evidence cost studies prepared after the alleged discriminatory sale and only for purposes of litigation. Rowe, *Cost Justification of Price Differentials Under the Robinson-Patman Act,* 59 Colum. L. Rev. 584, 610 (1959).

[25] Finally, if the buyer satisfies the burden of meeting complaint counsel's *prima facie* case, then complaint counsel must rebut the buyer's evidence. The buyer may then introduce other evidence responding to complaint counsel. Although the burden of going forward may shift back and forth during the hearing and is frequently not so easily segregated, the burden of persuasion as to the issue of whether the buyer had the requisite knowledge that the cost justification defense is unavailable rests with complaint counsel while the burden of persuasion as to the issue of whether the prices are, in fact, cost justified rests with the buyer. *Suburban Propane Gas Corp., supra,* 73 F.T.C. at 1274-1275; *see Beatrice Foods Co., supra,* 76 F.T.C. at 820.

We believe that the evidence submitted by complaint counsel in this case well exceeded its initial burden. Many competitors were charged a much higher price than A&P for Borden's milk products even though they bought in greater quantities than the individual A&P stores with which they were competing (*E.g.*, Burger's: CX 182, 187, 188A, RX 234, p. 19; Tr. 2270, 2381, 2385). Although many of these stores received more service than A&P, the service savings to Borden could not in any way justify the price differentials (*See* I.D. 109-110). In addition, even those companies that received limited service paid a higher price than A&P (*See* Complaint Counsel's Proposed Findings, Vol. 1 at 150-151), a price differential that was not justified

by the saving of such costs as advertising (*See* CX 54; Tr. 3387, 3430, 6136). A&P knew about the differentials, since it was being charged the "regular" price for branded items (*See* CX 75, 255; RX 66). [26] This evidence in itself would probably be sufficient to shift the burden of going forward. However, complaint counsel introduced much more evidence to demonstrate that A&P knew or should have known that the prices it received were not cost justified.

First, Borden stated explicitly that its final offer could *only* be justified on the basis of meeting competition, and A&P accepted the offer on this representation (Tr. 248, 886, 1789, 1792).[22] As the Supreme Court stated in *Automatic Canteen Co.* v. *FTC, supra,* 346 at U.S. 73: "§ 2(f) was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer." *Accord,* 80 Cong. Rec. 9419 (1936) (Statement of Congressman Utterback in presenting conference report to House); Report, *supra* note 6, at 193. The Borden statement put A&P on notice that it was likely that Borden did not have a cost justification defense. *Cf. Beatrice Foods Co., supra,* 76 F.T.C. at 821 (because seller was told by two other dairies that price might not be cost justified, he had notice of possible cost justification problems).

[27] Second, although A&P requested the customary assurances from Borden that Borden's discounts were avail-

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[22] When Ralph Minkler, President of Borden's Central District, presented Borden's final bid to A&P's Schmidt, he stated: "This price is given to you by us on the feeling and belief that we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis." (Tr. 248).

able to others on proportionately equal terms (Tr. 1783, 1786-1788, 1978-1979), A&P did not receive them. In fact, Borden specifically refused to comply, writing instead, "our prices are proper under applicable law and we are prepared to defend these prices." (CX 263H; *see* Tr. 1406, 1428, 1438-1440).[23]

Third, Borden provided A&P with detailed cost data during the course of the negotiations, data which showed that Borden would be either losing money or making a minimal profit (CX 23, 24, 25A, 26; Tr. 201-205, 1866-1869). Although the data may not be completely accurate, it demonstrates that A&P at least had knowledge that the discounts could drastically affect Borden's profits, and therefore, A&P should have inquired whether the prices were available to others. *See Fred Meyer, Inc.* v. *FTC, supra,* 359 F.2d at 365-67.[24] Of course, if the A&P-Borden contract was profitable for Borden before the [28] switch to limited service and Borden would lose money after the change, then

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[23] Herschel Smith, A&P's Headquarter's Dairy Buyer, said that he received oral assurances from Harry Archer, Borden's Executive Vice President in New York, that this was a letter of availability (Tr. 1407). However, Archer denied having such a conversation (Tr. 1246-1247). After viewing both witnesses and examining all of the evidence, Judge Hinkes did not credit Smith's testimony (I.D. 96).

[24] Citing *Automatic Canteen Co.* v. *FTC's* language about puffing in a bargaining situation, 346 U.S. at 80 n. 24, A&P argues that Borden might very well have submitted a purposely inaccurate bid (Appeal at 45-47). At this point, A&P's evaluation of Joseph Malone, the Vice President of Governmental Controls and formerly the Comptroller of Borden's Central District and the employee who prepared the data, is relevant: A&P believed that Malone was "honest and forthright." (Tr. 1843). In addition, if we disregarded all studies in which a self-interest motive is present, then, of course, we must dismiss the studies prepared for A&P's cost justification defense.

A&P should have doubted whether the new prices could be cost justified (*See* I.D. 91-93).[25]

Fourth, A&P's trade experience should have given it reason to know that Borden's private label prices were not cost justified. *See Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 79-80 (Trade experience "can afford a sufficient degree of knowledge to provide a basis for prosecution."); *Kroger Co.* v. *FTC, supra,* 438 F.2d at 1378. As Judge Hinkes concluded (I.D. 97, 98, 127), A&P was familiar with the dairy industry generally and with the Chicago area specifically. Also, A&P knew that Borden's private label price was substantially lower than its branded label price because A&P bought both types of milk from Borden (*See* CX 75, 255; RX 66). Therefore, A&P should have known that its competitors, some of whom received limited service, were paying much more than A&P for the same product.[26]

Finally, A&P's conduct after the private label agreement was consummated convinces us that A&P knew or had reason to [29] know that any differences in service were not cost justified. First, in mid-November of 1965, Borden decreased the price A&P paid for Borden label products but at a much lower discount than it granted A&P on private label products (RX 66). Except for the small amount devoted to advertising, there was no difference in the cost to Borden of private and branded products. Therefore, A&P should have realized that the price was not cost jus-

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[25] As noted at pages 23-24, we do not believe that complaint counsel has the burden of introducing a formal study demonstrating that the price differential is not cost justified and do not consider these calculations such a study.

[26] Of course, labels do not differentiate products for purposes of determining "like grade and quality." *FTC* v. *Borden Co.*, 383 U.S. 637, 640 (1966). The only benefit lost by A&P was advertising, which was a very small expense.

tified (*see* I.D. 99). Second, in May of 1966, A&P accepted an increase on Borden label products which reflected increased container, labor, and social security costs, an increase which Borden apparently charged all of its purchasers. However, A&P at first refused Borden's request that the price of A&P's private label products be raised commensurately (CX 79, 81, 255B; Tr. 1050-1054) and later accepted only a proportionately smaller increase (Tr. 1056-1062; *See* CX 102, 103, 105, 106, 110).[27] Because A&P readily accepted the increases on branded milk, we infer that A&P believed that Borden was selling branded milk to some of A&P's competitors at delivery terms similar to those at which Borden was selling branded and unbranded milk to A&P, and therefore, considering Borden's small advertising expenses, A&P's private label discount was not cost justified. *See Automatic Canteen Co.* v. *FTC*, *supra*, 346 U.S. at 80.

[30] In conclusion, viewing all of these facts together, we find that complaint counsel fully established a *prima facie* case that A&P knew or should have known that the prices Borden charged it for private label products was not cost justified.[28] The burden then shifted to A&P to

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[27] This action is conceivably a second inducement by A&P of discriminatory prices and therefore, a separate and distinct violation of the Robinson-Patman Act (*See* I.D. 57, 58, 89, 101; Complaint Counsel's Proposed Findings, Vol. I at 119). Because we have found that A&P received an illegal price preference prior to these increases, we do not specifically address this claim.

[28] We are not convinced that because Borden spread the savings over eleven rather than thirteen items, A&P was on notice that the bid was not cost justified. Although generally we agree that "the same cost savings applicable to different products with different volumes would not likely be related to * * * cost savings" (I.D. 90), it is at least conceivable that the $820,000 savings represented the amount Borden would save by switching to limited delivery service.

demonstrate that it did not have knowledge that the prices it received were not cost justified or, failing to establish that, that the prices were, in fact, cost justified.

We do not find persuasive A&P's assertions that it did not know nor should have known that the prices it received were not cost justified. Its statements concerning the meeting competition language in the negotiations and the "legal letter" are not convincing (*see* A&P's Proposed Findings at 76-86). In a post-hoc analysis of the cost data that Borden supplied it, A&P argued that the Borden study was not completely reliable (Appeal at 45-47). However, A&P did not show whether it had contemporaneous criticisms of the quality of the data nor whether it communicated any of its criticisms, perhaps in the form of additional inquiries, to Borden. As noted at page 27, this data does not have to be completely accurate [31] but is useful in proving that A&P was on notice that the new contract could be unprofitable to Borden. Finally, A&P's post-agreement behavior is relevant to show what knowledge A&P had at the time the agreement was entered.

A&P introduced evidence which showed that A&P's Smith used a "2-2-2 formula" to evaluate the reasonableness of a bid. The formula states that a dairy can profitably sell milk for approximately six cents more per quart than the dairy's cost for raw milk.[29] Although we agree that this formula is relevant in considering whether A&P had knowledge, it does not rebut complaint counsel's *prima facie* case. As noted, the formula was simply a reference point from which to estimate costs (Tr. 6399). It was developed from A&P's experience in negotiating for its private label supply of milk in New York and Massachusetts. Because

[29] Two cents each are allocated for cartons, plant costs and profits, and delivery costs (Tr. 6399).

the costs and conditions in the Chicago area were different (*e.g.*, in-plant wages: CX 25C, 26), it should have been adjusted. In fact, as A&P admits, the formula was never used to determine the exact measure of a dairy's cost but only to serve as a "workable rule of thumb." (Appeal at 49). Reliance on such a formula would be very irrational in light of all the other evidence (*See* I.D. 98).[30]

[32] Since A&P did not present enough evidence on the issue of knowledge to shift the burden back to complaint counsel, it had to submit a cost justification study if it wished to prevail. The studies entered by A&P on the record (RX 233, 234) were prepared specifically for purposes of this litigation.[31]

We affirm Judge Hinkes' findings (I.D. 136-165) that A&P's cost justification studies "are so defective and inadequate as to furnish no evidentiary basis" to justify the price differential that A&P received for private label products on the basis of Borden's cost savings (I.D. 165). Because the studies are so flawed, we would not find them persuasive under any reasonable standard. However, as we have stated, generally a buyer's cost justification study should meet the same standard that a seller's must. On the other hand, a buyer need not submit any study if complaint counsel fail to prove that the buyer knew or could

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[30] A&P's other arguments—for example, that A&P could get better prices on private labels in other parts of the country (Tr. 7326)—also do not adequately rebut complaint counsel's strong showing.

[31] Because we do not find the studies sufficiently reliable, we did not decide whether Borden's internal cost calculations (CX 54, 87, 206) are accurate. If A&P's studies adequately showed some type of cost justification, the Borden studies would have been considered as complaint counsel's rebuttal. Accordingly, we did not ascertain whether the A&P study (RX 232) which was offered to rebut Borden's internal cost calculations is accurate.

be charged with knowledge that the prices were not cost justified. *See* [33] *Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 74.[32] We note in passing that we would be willing to lower the standard if it was demonstrated that the buyer could not obtain the necessary records from the seller to undertake the study. *See id.* at 79, 81. A&P alleges that hostility existed between Borden and itself (Appeal at 15-16; A&P's Proposed Findings at 8-9) but does not confirm that these "inherent conflicts" prevented it from obtaining records from Borden. In fact, the record shows that A&P was able to get the documents it needed.

* * *

For all of these reasons, we find that the cost justification studies are inadequate to shift the burden back to complaint counsel. Therefore, we find that A&P did not prove that the differential it received was cost justified.

* * *

FINAL ORDER

[1] This matter having been heard by the Commission upon the appeal of The Great Atlantic & Pacific Tea Company, Inc. (hereinafter "A&P") from that portion of the initial decision dealing with Counts I and II, and upon the appeal of complaint counsel from that portion of the initial decision concerning Count III; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission for reasons stated in the accompanying opinion, having granted the appeal of A&P concerning

---

[32] Of course, if the seller is joined in the Robinson-Patman action and relies on the cost justification defense, he will submit the cost justification study.

Count I but otherwise denying the appeals of A&P and complaint counsel; accordingly

[2] *It is ordered,* That, except to the extent that it is inconsistent with the Commission's opinion, the initial decision of the administrative law judge be, and it hereby is, adopted together with the opinion accompanying this order as the Commission's final findings of fact and conclusions of law in this matter; and

It is further ordered, That the following order be, and it hereby is, entered:

ORDER

It is ordered, That A&P, a corporation, and its officers, representatives, agents, and employees, directly or through the use of any other device in connection with the offering to purchase or purchase of milk and other dairy products in commerce, as "commerce" is defined in the Robinson-Patman Act, for resale in outlets operated by A&P, do forthwith cease and desist from directly or indirectly inducing, receiving, or accepting from any seller a net price that A&P knows or has reason to know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers with whom A&P is competing; *provided, however,* that this prohibition shall not apply if A&P did not know and had no reason to know that the price difference in its favor did not make due allowance for cost differences resulting from differing methods or quantities in which such products are sold or delivered to such purchasers, or if A&P can show that said price was granted to it by the supplier to meet a competitor's equally low price, which [3] price A&P reasonably believed to be lawful. For the purpose of determining the "net price" under the terms of this order, there shall be

taken into account all discounts and other terms and conditions of sale.

It is further ordered, That A&P shall forthwith distribute a copy of this order to its operating divisions and to its suppliers of milk and other dairy products.

It is further ordered, That A&P notify the Commission at least thirty days prior to any proposed change in A&P's structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation, which may affect compliance obligations arising under this order.

It is further ordered, That A&P shall, within sixty (60) days after the effective date of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

Not having participated in the oral argument in this matter, Chairman Collier did not participate in the resolution of it.

APPENDIX D

Statutory Provisions

1. Section 2(a) of the Clayton Act, as amended, 15 U.S.C. § 13(a), provides:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on ac-

count thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

2. Section 2(b) of the Clayton Act, as amended, 15 U.S.C. § 13(b), provides:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an

equally low price of a competitor, or the services or facilities furnished by a competitor."

3. Section 2(f) of the Clayton Act, as amended, 15 U.S.C. § 13(f), provides:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

4. Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), provides:

> "(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
>
> (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

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Supreme Court, U. S.
FILED
OCT 31 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume I
Pages 1a to 554a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1977

CERTIORARI GRANTED MARCH 20, 1978

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Nov. 15, 1971	—Answer of Respondent The Great Atlantic & Pacific Tea Company, Inc. filed.
Feb. 9-10, 1972	—Deposition of Joseph Malone.
June 11, 1973	—Hearing commenced.
Nov. 2, 1973	—FTC concluded case in chief.
Mar. 11, 1974	—Respondents commenced case in chief.
July 31, 1974	—Respondents concluded case in chief.
Sept. 23, 1974	—FTC commenced rebuttal case.
Oct. 1, 1974	—FTC concluded rebuttal case.
Dec. 19, 1974	—A&P commenced surrebuttal case.
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Mar. 27, 1975	—Hearing concluded.
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Aug. 8, 1977	—Court of Appeals' denial of petition for rehearing or rehearing in banc.
Mar. 20, 1978	—Grant of petition for writ of certiorari.

Complaint

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 8866

In the Matter of

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

a corporation, and

BORDEN, INC., a corporation.

The Federal Trade Commission, having reason to believe that respondent The Great Atlantic & Pacific Tea Company, Inc. (hereinafter referred to as A & P), has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45) and the provisions of subsection (f) of Section 2 of the Clayton Act (15 U.S.C. Section 13f) as amended by the Robinson-Patman Act, approved June 19, 1936, and that respondent Borden, Inc. (hereinafter referred to as Borden), has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint charging as follows:

COUNT I

PARAGRAPH ONE: Respondent A & P is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business located at 420 Lexington Avenue, New York, New York 10017.

PARAGRAPH TWO: Respondent A & P is now, and for many years has been engaged in the operation of a large chain of retail grocery stores. There are presently more than 4500 stores operated by respondent in 34 states of the United States, the District of Columbia and in Canada. Respondent A & P also operates a number of plants for the manufacture and processing of food and other products handled in its stores, including plants which process and manufacture milk and other dairy products. A & P's annual sales for the fiscal year ended February 22, 1969, totalled over $5,436,325,000.00 and for the fiscal year ended February 28, 1970, they totalled $5,753,692,000.00.

Included among A & P's retail grocery chain stores are approximately 260 or more stores located in the States of Illinois (including the Chicago metropolitan area), Indiana and Iowa, which stores comprise the Chicago Division of A & P. This Division was formerly identified as the Chicago Unit of A & P's Middle Western Division.

PARAGRAPH THREE: In the course and conduct of its business, respondent A & P has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the amended Clayton Act. In the course of that commerce A & P has been purchasing grocery and household products, including milk and other dairy products, for resale within the United States, from sellers also engaged in "commerce," as commerce is defined in the Federal Trade Commission Act and the amended Clayton Act.

In connection with such transactions, A & P is now, and has been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for resale and resale of grocery and household products, including milk and other dairy products, of like grade and quality which are purchased from the same or competitive sellers.

The aforesaid sellers are located in the various states of the United States, and respondent A & P and such sellers cause the products when purchased by said respondent, to be transported from the place of processing, manufacture or purchase, to A & P's retail stores and warehouses located in the same state and various other states of the United States. Further, in many instances the sellers must purchase or obtain raw materials, supplies and finished products from states other than the state in which such products are processed, manufactured or purchased as aforesaid, in order to fulfill the obligations of said sellers in their commitments to supply respondent A & P.

PARAGRAPH FOUR: Respondent Borden (formerly The Borden Co.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 350 Madison Avenue, New York, New York 10017.

PARAGRAPH FIVE: Respondent Borden is a holding and operating company having on December 31, 1969, a 100% voting power in approximately 22 subsidiary corporations.

Respondent Borden has approximately 200 plants in the United States and Canada that are managed by four operating divisions. A diversified dairy business, including virtually all branches thereof, is conducted by Borden's Dairy and Services Division (formerly the Milk and Ice Cream Division). For this division, Borden's chief trade name is "Borden."

Respondent Borden owns, maintains and operates a large number of receiving stations, processing and manufacturing plants and distribution depots located in various states of the United States from which it sells and distributes its said products to purchasers.

Borden's net sales amounted to approximately $1,740,184,687.00 in 1969 and approximately $1,827,341,000.00 in 1970.

PARAGRAPH SIX: Respondent Borden sells milk and other dairy products of like grade and quality to a large number of purchasers located throughout the states of the United States, including the States of Illinois, Indiana and Iowa, for use, consumption or resale therein.

PARAGRAPH SEVEN: In the course and conduct of its business, respondent Borden is now, and for many years past has been, transporting raw milk, or causing the same to be transported, from dairy farms and other points of origin to said respondent's receiving stations, processing and manufacturing plants and distribution depots located in states other than the state of origin.

Respondent Borden is now, and for many years past has been, transporting milk and other dairy products, or causing the same to be transported, from the state or states where such products are processed, manufactured or stored in anticipation of sale or shipment to purchasers located in other states of the United States.

Respondent Borden also sells and distributes its said milk and other dairy products to purchasers located in the same states and places where such products are manufactured or stored in anticipation of sale.

All of the matters and things, including the acts, practices, sales and distribution by respondent Borden of its said milk and other dairy products, as hereinbefore alleged, were and are performed and done in a constant current of commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH EIGHT: Respondent Borden sells its milk and other dairy products to retailers. Borden's retailer-pur-

chasers resell to consumers. Many of said respondent's retailer-purchasers are in competition with other retailer-purchasers of Borden.

PARAGRAPH NINE: In the course and conduct of its business in commerce, respondent A & P has entered into an agreement with respondent Borden for the supply of milk and other dairy products, packaged under A & P's own private label, to the majority of the stores of A & P's Chicago Division (Chicago Unit at the time of initiation of the agreement). At the time Borden tendered its final offer to A & P, the offer which was accepted to form the said agreement, Borden informed respondent A & P that offer was being granted for the purpose of meeting competition in the form of an existing offer or offers which A & P then had in its possession. A & P accepted the said offer of Borden with knowledge that Borden had granted a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact.

By the term private label, it is meant that such products were packaged under labels bearing brand names owned by A & P or peculiar to the retail operations of A & P, its divisions and subsidiaries, rather than under labels displaying brand names owned by Borden or peculiar to the operations of Borden.

PARAGRAPH TEN: The aforegoing act and practice of respondent A & P violates the policy of Section 2 of the Clayton Act, as amended, is to the prejudice of the public and constitutes an unfair method of competition in commerce and an unfair act or practice in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C., Section 45.)

Complaint

Count II

PARAGRAPH ELEVEN: Paragraphs One Through Ten of Count I hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PARAGRAPH TWELVE: In the course and conduct of its business in commerce, respondent A & P has knowingly induced or received discriminations in price which are prohibited by subsection (a) of Section 2 of the Clayton Act, as amended.

Respondent A & P, in its negotiations with respondent Borden, before and after November 1, 1965, for the supply of milk and other dairy products under private label to the stores of A & P's Chicago Unit (now Division), knowingly induced prices which were and are discriminatory under the provisions of Section 2 of the amended Clayton Act. Further, respondent A & P has knowingly induced or received prices from Borden in the purchase of such products for said stores which said prices were and are discriminatory under the provisions of Section 2 of the amended Clayton Act.

PARAGRAPH THIRTEEN: When respondent A & P knowingly induced or received the discriminatory prices from its supplier, as alleged, A & P knew or should have known that such prices constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

PARAGRAPH FOURTEEN: The aforegoing acts and practices of A & P are in violation of subsection (f) of Section 2 of the Clayton Act, as amended.

Complaint

Count III

PARAGRAPH FIFTEEN: Paragraphs One through Thirteen of Counts I and II hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PARAGRAPH SIXTEEN: During the negotiations and dealings between respondents, before and after November 1, 1965, there developed a course of conduct to be followed by respondents. Pursuant thereto, A & P, for its part, introduced and sold private label milk and other dairy products at the prevailing retail price level for vendor label milk and dairy products, in spite of the fact that it was paying as much as 11 cents per gallon less for private label milk than it was paying for vendor (Borden) label milk. Thus, for its part in said course of conduct, A & P sustained and maintained existing retail prices for milk and other dairy products, and did not pass on to the consuming public any of the substantial price savings on private label milk and other dairy products which it received by reason of the wholesale price given it by Borden.

Further, pursuant to said course of conduct, Borden, for its part, failed to pass on, at the wholesale level, price reductions, similar to the reductions granted to A & P, to other purchasers who compete with A & P in the market areas covered by A & P's Chicago Unit (now Division).

The foregoing course of conduct constitutes a combination between respondents which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products. Said combination had the further effect of permitting A & P to retain the substantial monetary and competitive benefits of the discriminatory price advantage which it had obtained as a result of its private label agreement with Borden.

PARAGRAPH SEVENTEEN: The aforegoing acts and practices of respondents A & P and Borden are to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts or practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C., Section 45.)

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 8th day of October, A.D., 1971, issues its complaint against respondent.

Answer of Respondent The Great Atlantic & Pacific Tea Company, Inc.

[Caption Omitted in Printing]

Respondent, The Great Atlantic & Pacific Tea Company, Inc. ("A&P"), by its attorneys, Cahill, Gordon, Sonnett, Reindel & Ohl, for its answer to the complaint alleges as follows:

1. Admits the allegations of PARAGRAPH ONE and PARAGRAPH Two except alleges that A&P presently operates 4,329 stores in 36 States of the United States, the District of Columbia and Canada, 236 of which stores comprise A&P's Chicago Division.

2. In answer to PARAGRAPH THREE: With respect to the first paragraph thereof, admits that in the course and conduct of certain aspects of its business A&P has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the amended Clayton Act, but denies the other allegations of such paragraph. With respect to the second unnumbered paragraph thereof, admits that A&P is and has been in active competition with other corporations, partnerships, firms and individuals engaged in the purchase for resale and resale of grocery and household products, including milk and other dairy products, that some of such products are of like grade and quality and that some of such products are purchased from the same or competitive sellers, but denies the other allegations of such paragraph. With respect to the third unnumbered paragraph thereof, admits that A&P purchases grocery and household products from sellers located in various States of the United States, that before or after purchase by A&P such products may be transported from the place of processing or manufacture to A&P's retail stores or warehouses, some of which are located in the State in which

products purchased by A&P are processed or manufactured and some of which are not, admits the allegations of the second sentence of such paragraph, but denies the other allegations of such paragraph.

3. In answer to PARAGRAPH FOUR, admits upon information and belief that Borden is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 277 Park Avenue, New York, New York.

4. Denies having information sufficient to form a belief as to the correctness of the allegations of PARAGRAPH FIVE, PARAGRAPH SIX and PARAGRAPH SEVEN.

5. Upon information and belief, admits the allegations of PARAGRAPH EIGHT.

6. In answer to PARAGRAPH NINE, admits that A&P, beginning in November, 1965, has purchased from Borden milk and other dairy products, packaged under A&P's own private label, for resale in a majority of the stores of A&P's Chicago Division, admits the second unnumbered paragraph of such paragraph, but denies the other allegations of PARAGRAPH NINE.

7. Denies the allegations of PARAGRAPH TEN.

8. In answer to PARAGRAPH ELEVEN, realleges paragraphs 1 through 7 hereof.

9. Denies each and every allegation of PARAGRAPH TWELVE, PARAGRAPH THIRTEEN and PARAGRAPH FOURTEEN.

10. In answer to PARAGRAPH FIFTEEN, realleges paragraphs 1 through 9 hereof.

A&P Answer

11. Denies each and every allegation of PARAGRAPH SIXTEEN and PARAGRAPH SEVENTEEN.

AFFIRMATIVE DEFENSES

12. Count I of the complaint fails to state a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

13. Count II of the complaint fails to state a violation of subsection (f) of Section 2 of the Clayton Act, as amended (15 U.S.C. § 13(f)).

14. Count III of the complaint fails to state a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

15. Upon information and belief, any differential between any price charged by Borden to any competitor of A&P and any price charged by Borden to A&P for a product of like grade and quality made only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such product was sold or delivered to A&P.

16. In purchasing milk and other dairy products from Borden, A&P acted in good faith reliance upon Borden's representation and warranty that the prices for such milk and other dairy products were lawful prices.

17. In purchasing milk and other dairy products from Borden, A&P acted in good faith belief that any differential between any price charged by Borden to any competitor of A&P and any price charged by Borden to A&P for a product of like grade and quality made only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such product was sold or delivered to A&P.

A&P Answer

18. At the time it received private label price quotations from Borden in the fall of 1965, A&P believed in good faith that other grocery chains in the Chicago Metropolitan Area which are major competitors of A&P were buying milk and dairy products, including private label milk and dairy products, at prices as low as or lower than the prices then being quoted to A&P by Borden.

19. Borden did not disclose to A&P in any manner reasonably calculated to inform A&P that it was Borden's position that the only justification for the prices for private label milk and other dairy products sold by Borden to A&P was "meeting competition."

20. At no time did A&P, or any of its officers, employees or agents, mislead or misinform Borden or make any misstatement to Borden with respect to the existence or the nature of price quotations for milk and other dairy products made to A&P by competitors of Borden.

Dated: New York, New York
November 15, 1971

Respectfully submitted,

CAHILL, GORDON, SONNETT, REINDEL & OHL

By /s/ DENIS MCINERNEY
Denis McInerney

By /s/ MARSHALL H. COX, JR.
Marshall H. Cox, Jr.

Attorneys for Respondent
The Great Atlantic & Pacific
Tea Company, Inc.
80 Pine Street
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Application of Respondent The Great Atlantic & Pacific Tea Company, Inc. for Issuance of Subpoena Duces Tecum and for Vacation or Modification of Order

[Caption Omitted in Printing]

Respondent The Great Atlantic & Pacific Tea Company, Inc. ("A&P") hereby applies,

(i) Pursuant to Rules 3.34 and 3.36 of the Commission's Rules of Practice and the Freedom of Information Act, 5 U.S.C. § 552, for issuance of a subpoena duces tecum directed to Charles A. Tobin, Secretary, Federal Trade Commission, Washington, D.C., requiring him to appear before Hearing Examiner Schrup at a prehearing conference, at a time and place designated by the Hearing Examiner, for the purpose of producing for inspection and copying certain documents in his possession, custody or control; and

(ii) Pursuant to Rules 3.22 and 3.33(d) of the Commission's Rules of Practice for an order either vacating the order of the Hearing Examiner dated November 8, 1971 authorizing counsel supporting the complaint to take the depositions of Ralph R. Minkler, Gordon Tarr and Joseph Malone beginning December 1, 1971 in Chicago, Illinois, or modifying the order dated November 8, 1971 to reschedule the depositions of such individuals to commence one week after the return date fixed by the Hearing Examiner for the subpoena duces tecum requested in (i) above.

The documents which A&P seeks to have produced for inspection and copying are the following:

1. All transcripts of testimony, statements and affidavits of officers, employees or representatives of respondent Borden, Inc. ("Borden") or former officers,

employees or representatives of Borden (including without limitation Ralph R. Minkler, Gordon Tarr and Joseph Malone), and all documents containing statements by and all reports and memoranda of interviews or conferences with such officers, employees or representatives or former officers, employees or representatives of Borden (including without limitation Ralph R. Minkler, Gordon Tarr and Joseph Malone) relating in any way to the subject matter of the complaint herein;

2. All documents referred to or described in any of the foregoing transcripts, statements, affidavits, reports and memoranda;

3. All documents obtained in conjunction with Commission Investigation No. 671 0149 which refer or relate to contracts, proposals, negotiations, costs, cost savings, possible cost savings, meeting competition, prices, terms of trade or delivery terms for the supply or sale of milk or other dairy products (including private label milk and other dairy products) in the States of Illinois, Indiana or Iowa;

4. All documents obtained in conjunction with Commission Investigation No. 671 0149 which contain or refer to any market share figures, results of any market analysis, survey, study, statement or comment as to the market share or market position of any seller or buyer of milk or other dairy products in all or any part of the geographic area referred to in the complaint as having been served by A&P's Chicago Division (formerly Chicago Unit);

5. All documents which show for any time, between January 1, 1964 and October 14, 1971, the actual, offered or proposed prices or terms of sale or delivery of

milk or other dairy products to stores in A&P's Chicago Division (formerly Chicago Unit) or any competitor of such stores;

6. All documents which indicate, support or would tend to establish that any lower price charged by Borden to A&P, as alleged in the complaint herein, was made to meet the prices of a competitor of Borden; and

7. All documents which contain any evidence favorable to A&P herein, including any evidence which might weaken or overcome testimony adverse to A&P likely to be given by any witness or witnesses intended to be called by counsel supporting the complaint or any evidence which might otherwise be construed to be directly or indirectly exculpatory of any act or conduct alleged in the complaint to have been committed or engaged in by A&P.

The term "documents" is used in a comprehensive sense and includes without limitation letters, reports, memoranda, minutes, bulletins, circulars, notes, electronic recordings, charts, drawings, drafts, worksheets, advertisements, and other writings or printed matter of any nature including copies of any kind of any of such items. If any requested documents are deemed privileged or confidential, pursuant to Rule 4.10 or otherwise, each such document and the specific parts deemed privileged, confidential or otherwise not subject to discovery shall be identified, and the grounds on which the claim of privilege or confidentiality rests shall be separately stated as to each.

In support of its application for a subpoena duces tecum requiring the production of the above-described documents, and in support of its application that either the Hearing Examiner's order of November 8, 1971 be vacated or the

scheduled depositions be deferred pending completion of documentary discovery requested by this application, A&P asserts as follows with respect to the general relevancy of the material requested, the reasonableness of the scope of the subpoena and the need for vacating the order or deferring the requested depositions:

It is plain that the Hearing Examiner's order granting the application to take depositions by counsel supporting the complaint effectively amounts to an order that the hearing on the merits in this proceeding will commence with the depositions of these three witnesses. The purpose of these depositions is not to seek discovery, as counsel for the complaint have already had full discovery of A&P and Borden in protracted investigatory proceedings that have extended over several years. The stated purpose of these depositions is to preserve the testimony of three individuals—Ralph R. Minkler, Gordon Tarr and Joseph Malone—who, from what counsel supporting the complaint have said in their *ex parte* application for an order authorizing the depositions, are obviously the key witnesses upon whose testimony the case in support of the complaint will chiefly depend. Counsel supporting the complaint have requested that the Hearing Examiner be present at the taking of these depositions, and he has agreed to do so, because "it is expected the question of credibility among witnesses for the parties may arise and become important at the trial." The subject matters that counsel supporting the complaint expect these witnesses to testify about are described in detail in the Hearing Examiner's November 8, 1971 order in a statement that confirms in all respects A&P's understanding that, for all practical purposes, the testimony of these witnesses is the crux of the case in support of the complaint.

To require A&P to proceed to examine these three witnesses, who are expected to establish the case against it,

without first according A&P any opportunity whatever to prepare such an examination on the basis of full and adequate discovery would reduce this proceeding to a travesty.

Under the Commission's Rules and the Administrative Procedure Act, as amended, a litigant before this Commission is entitled to discovery of materials in the possession of the Commission or its staff which are likely to bear upon any aspect of the subject matter of the complaint about which witnesses offered by counsel supporting the complaint might be expected to testify. Since a primary basis for the order granted by the Hearing Examiner is the likelihood that these witnesses will testify only upon deposition—and not at an evidentiary hearing in ordinary course—discovery before the depositions commence is essential if A&P is to be accorded its right to conduct meaningful cross-examination.

The documents that A&P seek from the Commission are all directly related to the subject matter of the testimony that counsel supporting the complaint have indicated will be given by the three witnesses in question. A&P is entitled under the Commission's Rules and applicable provisions of law to significantly wider discovery than asked in the present application, and it is hereby expressly reserving its right hereafter to apply for the additional, broader discovery to which the law entitles it. Nonetheless, and in order that this proceeding may go forward promptly, we have elected to limit the instant application to the bare minimum of essential documents without which A&P cannot be reasonably required to go forward with the cross-examination of what are expected to be critically important witnesses.

WHEREFORE, we respectfully request that the Hearing Examiner grant this application and enter an order issuing the subpoena duces tecum requested by A&P and vacating

or modifying the order of November 8, 1971 as requested.

In view of the importance of this application to all further proceedings in this matter, A&P respectfully requests that oral argument be heard upon this application.

Respectfully submitted,

CAHILL, GORDON, SONNETT, REINDEL & OHL

By /s/ DENIS MCINERNEY
Denis McInerney

By /s/ MARSHALL H. COX, JR.
Marshall H. Cox, Jr.

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80 Pine Street
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(212) WHitehall 4-7400

Dated: New York, New York
November 15, 1971

Testimony of Joseph Malone

February 9-10, 1973

* * * * *

[11] * * *

Q. Did you advise your superiors, the president of the district, concerning cost accounting procedure problems as well as other types of problems the district might run into, sir? A. In the general application of responsibilities, I would say that I counseled with him. I did not advise.

Q. And you counseled with him concerning cost accounting problems? A. I counseled with him in regard to anything which I thought was necessary of counseling, whatever that might embrace.

Q. In the course of your employment with the Central District and the Chicago milk operation, your duties at one time or other did include the cost accounting procedures of the district, did they not, sir? A. I would say so.

Q. What is your educational background in the accounting field, sir? A. I attended Pace, which today is Pace Institute in New York City, and I took accounting there.

Q. Did you receive a degree in accounting? A. No, sir.

Hearing Examiner Schrup: How much time did you spend at Pace as a student?

[12] The Witness: I think it was almost three years, sir, if a recollect correctly. It was a long time ago.

But for the record I would say that intermittently I took additional courses at various universities from time to time.

Hearing Examiner Schrup: Will you name them, please?

The Witness: I attended College of New York, at the Thompson Harris Section, and I also took some courses at Columbia University. These are accounting and economic courses.

Testimony of Joseph Malone

By Mr. Mathias:

Q. Did you have any other professional qualifications that you have not mentioned, sir, as an accountant or cost accountant? A. No, I don't understand what you mean by professional qualifications.

Q. Have you received any professional recognition from accounting groups? A. Not from accounting groups.

Q. From any type of association or group? A. I think in that regard I was Chairman of the Accounting Advisory Board of the old International Dairy Association, and I was also appointed to a study group by the State of Wisconsin in connection with their State Fair Trade Practices Act.

* * * * *

[15] * * *

Q. Prior to your appointment as vice president of governmental controls, had you in any of your positions with Borden conducted cost studies into Borden's distribution to various customers within the Central District, or the Chicago Milk District? A. Yes.

Q. Do you recall how many of such studies you had conducted? A. You mean formal time and motion studies?

Q. Yes, formal cost studies. A. Formal time and motion studies?

Q. Yes, sir. A. We had in two instances formal time and motion studies under way.

Q. Could you tell us the occasion of the first instance, sir? A. One was in Chicago, and we had a matter which required a cost justification finding, and we made a complete time and motion study of the market.

[16] Q. What was that matter, sir? What was the matter that required the preparation? A. I don't recall exactly what the issue was, but it was a matter between U.S. of America versus Borden.

Q. And do you recall the approximate date of this time study? A. No, sir.

Q. Was it during the 1950s, sir? A. It could be in that period. It is pretty far back.

Q. Do you recall whether or not that involved a possible justification for differences in price between sales to chain stores as compared to independent stores? A. I think that was one of the issues.

Q. Do you recall the chain stores that were involved, sir? A. At that time the company served two particular ones, which are Jewel Tea Company at that time, and the Great Atlantic and Pacific Tea Company.

Q. Sir, in the course of preparing this cost study, the one dealing with this particular matter involving Jewel and the Great Atlantic and Pacific Tea Company, were you called as an expert witness in those proceedings? A. I think I was.

Q. What other cost study involving a time and motion study did you conduct for the Borden Company? A. We had one matter in the State of Wisconsin.

[17] Q. Was that prior to or later than the U. S. versus Borden study? A. Subsequent to.

Q. Do you recall the approximate time when that study was conducted? A. No, sir.

Q. Was that related to any particular incident or complaint against the Borden Company? A. There was no complaint issued, sir.

Q. Was there any particular incident that required this cost study, or was this a general inquiry by the State of Wisconsin? A. I would take it that it was a general inquiry by the State of Wisconsin.

Q. To your knowledge, were other companies required to make cost studies at this time? A. I would not know, sir.

Hearing Examiner Schrup: These cost studies in this Wisconsin situation, did they involve the sale and distribution of milk?

The Witness: Yes.

By Mr. Mathias:

Q. I don't think we covered this. In U. S. versus Borden, the cost study involved the sale and distribution of milk, also, did it not, sir? [18] A. Yes, sir.

Q. In connection with the Wisconsin study, did you have to appear in any formal proceeding? A. No, sir.

Q. Was there any informal proceeding by the State of Wisconsin? A. Just a discussion in respect to the procedure that we would follow in arriving at the data which was necessary to support the issue.

Q. Did they accept the procedure which Borden followed in conducting the cost studies? A. Yes, sir.

Q. Would you describe in general the background of the cost study, the manner in which the cost study was prepared in Wisconsin? A. It was formalized into a method and procedure to be followed at every level of distribution and individuals were assigned to develop the data, the time, and the facts involved at each level. They rode the routes, they listed the information, they made records of the volume, and made record of the time, as I indicated, of every functional activity which was involved.

Q. Can you tell me what action or inquiry on the part of the State of Wisconsin prompted this study? A. It was a matter of selling prices to the Kroger Company.

[19] Q. And did the cost study then involve again the justification of lower prices, of prices to a chain as compared to prices to various independent store units? A. No, I don't think it involved that. It involved the pricing policies in the State of Wisconsin as related to the Wisconsin Dairy Trade Practices Act.

Testimony of Joseph Malone

Q. Did the Wisconsin study involve a study of different methods of delivery? A. It involved the type of delivery that was in effect in the State of Wisconsin by Borden.

Q. Do you recall what the types of delivery you had in effect at that point? A. No, sir.

Q. Do you know whether it involved dropped delivery, that is, dropping off the product at the store without servicing the cases inside? A. I think within the State of Wisconsin you would find that the type of delivery was geared to the particular area that was involved. It could embrace all types of distribution.

Q. So that your study would involve a broad variety of distribution services. Is that right, sir? A. Yes, sir. In other words, the study covered completely Borden's activities and distribution of milk in the State of Wisconsin.

* * * * *

[43] * * *

The Witness: No, we are not talking about A&P. We are talking about sales of private label milk versus advertised brands.

By Mr. Mathias:

Q. So this was a price differential Borden had used in some other area. Is that correct? A. Yes, sir.

Q. By a half cent per point, what is meant in the dairy industry by the term "point"? A. The point is equivalent to a quart of milk. That is the yardstick.

Q. So that all dairy units are divided up as quart equivalents? A. Not quart equivalents. The factor is generally related to points. Points are involved in union contracts and union contracts generally spell out what a point represents, and this is generally the basic quantitative measurement that has been used consistently in the industry.

Q. How many points would be in a half gallon? A. Two

Q. And a gallon would be four? A. That is right, sir.

Testimony of Joseph Malone

Q. And these are applied also to the various by-products such as cottage cheese. Is that correct? [44] A. Yes, sir.

Q. How, generally, are they related to the quart? A. A package of cottage cheese would be one point.

Q. Is this based on size, bulk, price, or what? A. No, a one pound container would be one point.

Q. So it is basically a size or weight equivalent? A. Not weight. Generally the size of the package.

Q. All right, sir.

Now, Mr. Malone, I show you Commission Exhibit 8-A through C for Identification. This is the December proposal.

It would appear in comparing it with the November proposal that there has been an increase of one cent per half gallon on the differential between the private label and Borden label.

I take it that this would be an increase from a half cent per point differential to a full cent per point differential. Is that correct? A. That is what the schedule shows, sir.

Q. Did you participate in the decision to change the differential being offered from a half cent per point to a cent per point? A. I think there was general discussion.

Q. Do you recall who was involved in these discussions, sir? A. No, sir.

* * * * *

[51] * * *

Q. This does not outline all of the restrictions on your delivery program under your Chicago union contracts, does it, sir? A. No, sir. This is talking about, or rather, this is indicating that the prices that are quoted here to A&P, or proposed to A&P, are subject to these conditions.

Q. Yes, sir. But, now, there may have been other restrictions on your delivery program under your Chicago union contracts which did not exist in other market areas which would not be apparent from the reading of these four items. Is that not correct, sir? A. That could be true.

Testimony of Joseph Malone

Q. Sir, referring again to Commission Exhibit 8-A, and the four numbered items at the bottom of the page, under heading, "Delivery shall be as follows," how did this compare with your normal delivery programs in Chicago at that time? A. Taking items 2, 3, and 4, normally the route driver would make delivery to the refrigerator case and put the product in and rotate the product. If a customer required a special delivery, a special delivery would have been made. And if the product became outdated, it would be returned and replaced.

[52] Q. Were the modifications as set forth here on Commission Exhibit 8-A, was this delivery program allowable under your union contract at that time, sir? A. Yes, sir.

Q. Do you know whether or not this type of delivery program was in effect in sales to any of your customers in the Chicago area at that time? A. The general program that was in effect, this is what I have just previously outlined to you.

Q. That would be to rotate the product in the case? A. Yes, plus special delivery function and plus the refrigerator case delivery.

Q. Was it possible that some customers in the Chicago area were getting this modified type of service at this time? A. No, sir.

Q. Sir, do you recall whether in the succeeding months, the rest of 1965 and up into 1966, there was any change in this union requirement of six-day delivery? A. I don't recall any.

Q. Mr. Malone, I hand you Commission Exhibit 12-A and B for Identification, and ask you to familiarize yourself with this document, sir.

Mr. Malone, I also hand you Commission Exhibit 14-A through E, and request you to familiarize yourself with these documents.

• • • • •

Testimony of Joseph Malone

[77] What would be a contract hauler? What type of delivery would this be, sir? A. This would be an independent contractor. In other words, an individual who was in business for himself hauling product.

Q. So that in, for instance, the Lockport-Joliet area, which is the first one in the list in area No. 1, there the Borden deliveries would be made through a contractual hauler rather than your own routes? A. That is right. One thing I would like to point out, while we say data re A&P delivery cost, that is purely an identification. This does not mean that this is the delivery cost to an A&P. It is just to tie it in with the subject, that is all. The delivery cost and the type that we have here would be the cost of delivering at wholesale in these particular areas.

Q. These would be your estimate of deliveries? A. These would be estimates. We had no factual data. They are broad estimates at their best. It is an attempt to relate, based upon the good judgment of the person who developed it to what might be the average delivery cost.

Q. Then in the Woodstock area which is the next area listed, you have route, Local 301. A. That is right.

Q. What would this designation mean? A. That would be a company route operating under the profi— provisions of the union contract with Local 301.

* * * * *

[102] * * *

Q. Referring on this same page of Commission Exhibit 19-F, to the second full paragraph, the last sentence reads, "Product items were priced generally not in relation to cost but in relation to other competitors and in many cases to a cost appraisal which only recognized out-of-pocket elements of cost."

What did you mean by this, Mr. Malone? A. We were mainly referring to smaller markets in which the competi-

tion is small dealers. In the smaller markets we were indicating to Mr. Schmidt that price factors sometimes are not related actually to cost because they don't know their cost and they keep no cost records and they jump all around.

Q. Now in the larger market areas such as Chicago, was your price computed in relation to your cost, or was there some competitive element in setting your prices in that market? A. I think in all major markets as well as in secondary markets there is always the matter of competition.

Q. Which was more important in setting your prices in these markets, the competitive price level or your cost? A. I don't understand the question.

* * * * *

[122] * * *

Q. Can you identify these documents, sir? A. As I indicated before, I can identify the summary sheet.

Q. That is Commission Exhibit 38? A. That is right.

Q. Do you recall having seen Commission Exhibit 39 previously that is "Cost differentials A&P vs. Borden label by items." A. I don't recall it specifically but I assume I must have seen it to prepare this.

Q. You did prepare Commission Exhibit 38? A. The summary only.

Q. That would have been based on a document similar to Commission Exhibit 39, is that correct, sir? A. No, only in total is it similar. This is entirely different.

Q. The total savings shown in each document? A. That is right.

Q. Now, Mr. Malone, I hand you Commission Exhibit 42-A through -E for identification and I ask you to familiarize your self with this document. A. Yes.

Testimony of Joseph Malone

Q. Referring to Commission Exhibits 42-A through -D, leaving out the handwritten memo from the desk of J. B. Pentz, the last page, are you familiar with this document, sir? A. I am familiar with A through D, inclusive. I am not [123] familiar with E.

Q. What part, if any, did you play in the preparation of Commission Exhibit 42-A through -D? A. As I recall, I prepared it, sir.

Q. Why was this document prepared? A. I wanted to acquaint and inform management as to what would be the economic result if we lost A&P business.

Q. Why were you concerned with that question at this time? A. It is always a possibility, sir.

Q. I note a date appearing on Commission Exhibits 42-B through -D of 8/16/65. This would have been subsequent to your revised offer, proposal, to A&P of August 13. Was there any indication at this time that you might lose the A&P business? A. Not to my knowledge.

Q. For whom was this document prepared? A. I prepared it basically as informative data. I was not requested by anybody. It was just my own undertaking.

Q. Was it prepared on August 16 as indicated by the second, third, and fourth pages? A. I don't recall, sir.

Q. Whose handwriting appears at the bottom right-hand corner of Commission Exhibit 42-A? A. I don't know, sir. It is not mine.

Q. What period of the year, approximately, would the 6th period have included?

* * * * *

[149] Mr. Mathias: After my question has been answered.

Hearing Examiner Schrup: The question has been answered.

Testimony of Joseph Malone

Mr. Mathias: He did say yes?

Voir Dire Examination by Mr. McInerney:

Q. Are these actually costs to A&P or are these estimates? A. As I started to explain to His Honor, I have indicated previously in regard to every cost schedule that these costs are estimated costs. They are not actual costs obtained from any cost accounting element that the company has.

Hearing Examiner Schrup: How did you come to these estimated costs, so-called? What was your basis for putting those down on this paper?

The Witness: I had review elements of cost that pertained to various functions of our business. Naturally, Your Honor, over a period of time you develop a rapport as to what you believe as a matter of judgment. It is a matter of judgment of the cost accountant.

By Mr. McInerney:

Q. Were they directed specifically to A&P, these estimates or were they general estimates of cost in general? A. These are general estimates of cost which would relate to the functions that were involved.

Q. So, where it says credit and collection expense, for example, the credit and collection and expense there referred [150] to might be much less in the case of A&P than it would be with respect to other wholesale customers that you had? A. That is right. We never had the situation where A&P never paid its bill.

Q. Therefore, is it fair to say that these cost elements do not relate to A&P? A. As I said, sir, they are based upon the functional activity of distribution of milk at wholesale.

Testimony of Joseph Malone

Hearing Examiner Schrup: I think I understand the witness's answer.

Direct Examination by Mr. Mathias (continued):

Q. Sir, was there any attempt in making these various computations in dealing with pricing and costs to A&P to tie in the then current sales volume to A&P on the Borden label; in other words, in order to reach an estimate as to what the volume might be under the private label arrangement? A. I just don't understand the question. Just make it more condensed and I might understand it.

Q. In your various computations dealing with the A&P proposal, did you consider or did you project the volume that might be involved in your sales to A&P? A. We had basic records which showed the volume of business that we were doing with A&P.

* * * * *

[159] Q. In the case of Mr. Tarr, would any of his duties in contacting A&P be included in the direct expense on this document? A. No, sir.

Q. Are you familiar with advertising programs conducted by the central division during this period of time, sir, during 1965? A. I don't know what you mean by "familiar".

Q. Do you know what types of advertising programs they had? A. I do not recall.

Q. Now, referring, Mr. Malone, to Commission Exhibit 55, that is, the handwritten memorandum, why was this document written? A. I think I explained previously a number of times that is my practice, to keep a record of every facet that took place in connection with the project.

Q. Now, in connection with Commission Exhibit 54, that is, your computation, was this document prepared for internal guidance purposes? A. Yes, sir.

Q. Was it shown to A&P? A. I would not know.

Q. As you prepared it, was it intended to be shown to A&P? A. I prepared it, as I indicated to you, sir, for internal purposes, for informative information to management.

* * * * *

[171] * * *

A. This was a report.

This memorandum of mine is a report that was made at the meeting as it was reported by Mr. Minkler.

Q. That is Commission Exhibit 63, sir? A. Yes, sir.

Q. Now, what I am asking you, sir, is: Do you have any present recollection of a discussion with Mr. Minkler concerning a letter to A&P concerning the availability of price to competitors? A. It might have been generally reviewed but that was outside of my concept of responsibility.

Q. Referring to Commission Exhibit 68, did you participate in writing that letter, sir? A. No, sir.

Q. Have you seen it before, sir? A. Yes, sir.

Q. Did you participate in discussions which led up to its preparation, sir? A. I can't recall. I can't recall the temper of the occasion at all.

Hearing Examiner Schrup: What does it mean in your memorandum of September 22, 1965, which is Commission Exhibit for identification 63-C, in the fourth paragraph when you say "talked about letter". What were you referring to there? * * *

[178] * * *

(Brief recess.)

Hearing Examiner Schrup: Back on the record.

Testimony of Joseph Malone

By Mr. Mathias:

Q. Mr. Malone, can you identify Commission Exhibit 76 with subparts and 77 and 78 with subparts? A. Yes, sir.

Q. What are these documents? A. The documents represent data in connection with the changes in cost incurred as a result of changed wage contract rates, changes in other wage costs.

Q. Were there container cost increases included in these computations as well, sir? A. Yes, sir.

Q. Referring to Commission Exhibit 79, can you identify this document? A. Yes, sir.

Q. What is it, sir? A. It shows the average increased cost per point covering 1966 union contract changes, 1965 contract changes, increases in Pure-Pak container costs and increase in Social Security taxes.

Q. Mr. Malone, who prepared Commission Exhibit 79? A. I did, sir.

[179] Q. Who prepared Commission Exhibits 76 through 78 with various subparts? A. The 77-A was prepared by me. The remaining data was prepared by various accounting people under my direction.

Q. That was under your direction and control? A. Yes, sir.

Q. Is the data in Commission Exhibits 76 through 78 the underlying data for Commission Exhibit 79, sir? A. Yes, sir.

Q. Mr. Malone, what was the purpose of Commission Exhibit 79? A. The purpose of Exhibit 79 was to secure an increase in our price to our customer which recognized these changes.

Q. That is, secure an increase in your price to A&P? A. That is right.

Q. Was this document, Commission Exhibit 79, prepared to be shown to A&P or was it prepared for internal purposes? A. It was prepared for both.

Testimony of Joseph Malone

Q. Are the estimated average increased costs per point listed on Commission Exhibit 79-A applicable to the A&P sales in particular? A. No. We had to take the total increases and relate it to our total volume.

Q. Were you instructed by Mr. Minkler to prepare this document? A. No, sir.

[180] Q. Why was it prepared then, sir? A. It was prepared in conjunction with the discussions between Mr. Gose and myself.

Q. Who is Mr. Gose? A. Mr. Gose was then in charge of the Chicago Metropolitan milk operation.

Q. His name is spelled G-o-s-e? A. G-o-s-e. Yes, sir.

Q. Was this document then prepared at the instance of Mr. Gose, at his request? A. It was prepared at his request, yes.

Q. Do you know whether this document was delivered to A&P? A. Actually, as far as delivery per se is concerned, I can't recall but I do know that the document was reviewed with our customer.

Q. That is with A&P? A. That is right.

Q. Who reviewed the contents of this document with A&P? Who participated in the negotiations? A. Mr. Gose and myself.

Q. So you did participate in these negotiations personally? A. Yes, sir.

Q. Mr. Malone, I hand you Commission Exhibits 82 through 86 with various subparts and ask you to glance through these documents, sir.

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AFTERNOON SESSION

[184]

1:45 p.m.

Hearing Examiner Schrup: On the record.
You may continue, Mr. Mathias.

Testimony of Joseph Malone

JOSEPH F. MALONE resumed the stand and testified further as follows:

Direct Examination by Mr. Mathias (continued):

Q. Mr. Malone, I hand you Commission Exhibit for identification 87-A through C. I would like you to familiarize yourself with this document, sir.

Let the record show that I am handing Mr. Malone the original of this document.

Let the record show that this exhibit is a 3-page document containing various computations, the first page of which is entitled "Summary of operating results, sales to Great Atlantic and Pacific Tea Company", dated 6-19-66.

Mr. Malone, can you identify this document? A. Yes, sir.

Q. Who prepared this document? A. I did, sir.

Q. What is it, sir? A. The three documents representing 87-A, B, and C, were developed in an attempt to reconcile our position as to which would be the best course for us to follow. Number one, we had [185] the experience with the A&P private label operation and we wanted to see on a general basis, on a general application of the elements of cost, what our position would be, either lose or gain, and relate that to where we would be if we lose all of the business.

Hearing Examiner Schrup: All of the A&P business?

The Witness: All of the A&P business, yes.

By Mr. Mathias:

Q. Why was this document prepared, Mr. Malone? A. I think it is a very important economic consideration on the part of our company in this regard.

Q. At the time this was prepared had you received any

response from A&P concerning your request for an increase in prices based on the increase in labor and container costs? A. I can't recall.

Q. Were the computations in Commission Exhibit 87-A through C shown to A&P? A. I don't know.

Q. Were they prepared to be shown to A&P? A. I did not prepare them for that purpose.

Q. Did you prepare them for the purpose of internal guidance for Borden? A. Yes, sir.

Q. Your answer was yes? A. Yes.

[186] Q. Mr. Malone, at the time that Commission Exhibit 87 was prepared did you feel you were in danger of losing the A&P business? A. No, sir.

Q. Mr. Malone, I hand you Commission Exhibits 88-A through F for identification. I ask you if you can identify these documents. A. Just rough working papers with determination of summaries—I don't know what.

Q. Would it appear they bore a relationship to the increase in labor costs previously referred to? A. I wouldn't know.

Q. Were these work papers prepared by you, Mr. Malone A. No, sir, except 88-F.

Q. Commission Exhibit 88-F was prepared by you? A. That is right.

Q. Can you tell by looking at Commission Exhibit 88-F to what that document referred, sir? A. It referred to wage costs. How it was used I don't know.

Q. Now I hand you Commission Exhibit 89 for identification and ask you if you can identify this document, sir. A. Yes, sir.

Q. What is this document, sir? A. It is just rough working papers in connection with our delivery costs.

[187] Q. This was prepared by you, sir? A. Yes, sir.

Q. Can you tell under what circumstances this paper was written, sir? A. No, sir.

Hearing Examiner Schrup: Did you keep files on these papers?

The Witness: I beg your pardon?

Hearing Examiner Schrup: Did you keep files on these papers? For example, did you have such a thing as an A&P file and put all the papers on A&P in?

The Witness: Yes, sir. I think this is where all the materials came from.

Hearing Examiner Schrup: You put them in the A&P file or the Borden file? The name in the Borden offices was entitled "A&P File"?

The Witness: I can't tell you exactly what it was titled but it related directly to the project.

By Mr. Mathias:

Q. I hand you Commission Exhibit 90-A through D for identification. Commission Exhibit 90-A and B is a memorandum entitled "File memo, A&P," which appears to be dated 6-29-66, and 90-C through E a typewritten transcription thereof. A. Yes, sir.

Q. Have you also read the typewritten transcription, [188] Mr. Malone? A. I haven't read it word for word, but I think it is generally the same.

Q. Can you identify this document, Mr. Malone? A. Yes, sir.

Q. What is it, sir? A. It is a document in relationship to our consideration of securing an increase in the price to our customer to cover increased wage costs.

Q. This customer was A&P, sir? A. Yes, sir.

Q. Who wrote this document? A. I did, sir.

Q. Is the typewritten transcription thereof an accurate one? A. Yes, sir.

Q. Why was this document written, sir? A. It represented our discussion with Mr. Pentz and Mr. Comfort in

regard to securing a proposed increase, selling price increase.

Q. Who was Mr. Comfort? A. Mr. Comfort was an assistant to Mr. Pentz.

Q. Were they employed by Borden? A. Yes, sir.

Q. And in what office? A. The New York corporate office.

[189] Q. Was this memorandum written in keeping with your general practice of writing memoranda concerning such meetings and conferences? A. In regard to, you know, major projects.

Q. Under what circumstances was this memorandum written, Mr. Malone? A. What do you mean by circumstances, sir?

Q. Did this involve a conference, a personal conference between you and Mr. Pentz and Mr. Comfort, or was it a telephone conversation, or what gave rise to this memorandum? A. I would say it was a telephone conversation.

Q. Did anyone else from the Chicago office participate in this conversation, to your knowledge? A. I can't recall.

Q. I see in the last paragraph on the second page of Commission Exhibit 90 there is a mention of Ralph. Would that be Ralph Minkler, Mr. Malone? A. Yes, sir.

Q. Was he then still in charge of the Chicago area operation? A. I don't know.

Q. Referring to the typewritten transcription, Mr. Malone, on the second page thereof, that would be Commission Exhibit 90-D, the first full paragraph there is mention of the opening expense of the Woodstock plant. A. Yes, sir.

[190] Q. What is meant by this, sir? A. What was meant is that at the time negotiations were being held with our customer that our Woodstock plant was just in the stages of being opened. Therefore, it was very difficult to try to relate wage cost from one period to the other and operating factors from one period to the other.

Testimony of Joseph Malone

Q. You also mentioned in the last sentence of that paragraph that your total labor cost per point had been affected by increased distributor volume. What did you mean by this, sir? A. During the period the company was fortunate enough to secure additional distributor business.

Q. You also mentioned that during most of that period A&P volume had decreased. Do you recall what you meant by this statement, Mr. Malone? A. What paragraph is that on?

Q. That is in the last part of the last sentence of the same paragraph. A. This could only mean that the volume which we sold to A&P had decreased from the level it was at the time we were negotiating.

Q. Mr. Malone, I hand you Commission Exhibit 177-A through C, the first page of which is a letter to Mr. Jack B. Pentz from Ralph R. Minkler dated January 3, 1965, and the last two pages contain a series of figures entitled "All stores sales—a comparison, 1965-1964."

* * * * *

[210] * * *

Q. You had nothing to do with the billing procedure? A. No, sir.

Q. Mr. Malone, early yesterday morning when we were discussing your background and experience you mentioned that you had conducted only two cost studies in which time and motion studies were included. Did you from time to time during your employment with Borden conduct other cost studies concerning the cost of delivery and service on your Borden routes? A. I would imagine from time to time there was analytical review made of elements of cost, but time and motion studies of the kind that I have referred to early yesterday morning were entirely different.

Q. These would be what, full blown cost studies? A. That is right.

Q. Others would be— A. Just analytical review.

Testimony of Joseph Malone

Q. Did you conduct this type of review quite frequently during your employment with Borden? A. I don't know what you mean by quite frequently, sir. Quite frequently to me could mean every day, every week, every month. Any studies that I had to do would be dependent upon the issue that was involved. It was not a recurring matter.

Q. If a particular problem arose in your sales or your routes, then you would be called upon to study the situation? [211] A. If a matter was assigned to me.

Q. I think one of your duties was controller of the central district during the course of your employ with Borden, was it not, sir? A. That is right.

Q. Would a major portion of your concern in that position deal with the costs of Borden in its various operations? A. It would deal with the overall results that revolved from the records of sales, cost of sales, and the bottom line.

Q. What do you mean by the bottom line? A. Profit.

Q. This is the point where the sales turn to a profit level, is that what you mean, sir? A. This is the name of the game. This is what you are in business for.

Mr. Mathias: No further direct, Your Honor.

Hearing Examiner Schrup: You may cross-examine.

Cross Examination by Mr. White:

Q. Mr. Malone, you stated during your direct examination that during the period 1964 and subsequent thereto you were a vice-president in charge of government controls or regulations. Is that correct? A. That is right, sir.

Q. Was this a corporate officer position with Borden? [212] A. No, sir. It was a division or district position.

Q. Were you at any time during your 42 years with Borden ever an officer of the corporation? A. No, sir.

Testimony of Joseph Malone

Q. Mr. Malone, there has been a lot of discussion for the last two days about cost accounting, and a review of your background. During the period 1964 until the end of your employment with Borden did Borden regularly keep, with respect to the Chicago Metropolitan area, cost accounting records on a product and container size basis? A. No, sir.

Q. Did Borden during this period of time with respect to the Chicago Metropolitan area keep such cost accounting information by customer? A. No, sir.

Q. Cost accounting, as I understand it, involves among other things the problem of the allocation of joint costs? A. That is right.

Q. And the allocation of indirect costs? A. That is right.

Q. In the accounting profession is there more than one recognized procedure for assigning joint costs or allocating indirect costs? A. There are various approaches to the problem.

Q. In your opinion has the accounting profession developed [213] a single approved method of cost accounting? A. I would say no.

Q. During your direct examination you were shown a great many working papers. For example, Commission Exhibits 13, 17, 20, 54, with various subparts. Did any of these documents represent on your part a detailed cost accounting approach? A. No. They represented a general approach to the problem.

Q. As a matter of fact, isn't it true that Borden's accounting records are such that the cost figures that you have readily available to you are on broad product classification? In other words, milk and milk by-products, for example, on the one hand? A. Yes, sir.

Q. Isn't it also true that the records that are regularly kept by Borden with respect to expenses are kept in broad categories such as the cost of wholesale delivery or the

cost of retail delivery or sales expense, gross figures? A. Basically, the fundamental material available from the Borden records is in total dollars covering the operation not separated at all between whether it is retail, wholesale or bulk wholesale.

Q. So that is a cost accounting approach one of the first steps would be to try to allocate those costs by function in a definitive way and by the customer who receives that function if you were to follow a cost analysis, is that correct? A. If you were doing it in a very detailed scientific [214] way that is correct.

Q. During 1965 when you were using the general figures that were available to you, what is your best memory as to whether or not the Woodstock plant had been in operation for any extended period of time? A. I can't recall how long it had been in operation.

Q. Was this generally, however, during its earlier period of operation? A. Yes, sir.

Q. Did Borden experience any difficulties in the operation of the Woodstock plant during the early period? A. I think it had the normal setup difficulties there are related to a new plant, especially one that is fully automated as Woodstock was.

Q. In one of these exhibits that counsel went over with you yesterday there was, for example, reference to the Irving Park Branch. Do you recall that, sir? A. Yes, sir.

Q. Was the Irving Park Branch in continuous operation from that point on until the time you left the employ of Borden? A. No, the Irving Park plant had been closed and operations ceased at that point, sometime before I terminated my position with Borden.

Q. During the course of your direct examination today a good deal of time has been spent on the question of the increases in [215] wage costs subsequent to the time when Borden began to supply private label to A&P in the Chicago area. For example, I believe you identified and discussed

to some extent Commission Exhibit 79. Mr. Malone, were the costs reflected on Exhibit 79, and the similar calculations you reviewed direct costs easily identifiable with A&P? A. No, sir.

Q. So that these calculations necessarily involved an allocation of costs shared by more than one customer? A. Yes.

Q. And with respect to different products? A. Yes, sir.

Q. Is it your opinion that the development and allocation of the costs represented by Commission Exhibit 79 and the similar data that you have reviewed is the only possible cost accounting basis for the assignment of those figures? A. Yes, sir, it is my opinion that it is the only assignable way.

Q. There would be no other manner in which, under other accepted cost accounting principles, that they could be assigned? A. I could indicate that through proper analysis of each route a result could be obtained.

Q. And that might give a different result than the one that is shown, for example, on Commission Exhibit 79. A. It could very well.

[216] Q. Now, the contemplated private label program with A&P involved, as I think you have pointed out, some different method of delivery and sale than was then being used with respect to that customer in the Chicago area, is that correct? A. I didn't get the question.

Hearing Examiner Schrup: Read the question back, please.

(Question read.)

The Witness: That is right.

By Mr. White:

Q. So that at the time you were preparing many of the informative schedules that you prepared for management

you did not have available to you a situation from which you could make a cost analysis based on the kind of service you were actually going to give A&P in the future, is that correct? A. That is right.

Q. Mr. Malone, how many times did you meet with any representative of A&P concerning the private label program prior to the time that Borden actually began to supply a private label to A&P? A. I met with A&P personnel at the time I visited with Mr. Schmidt and I met with A&P personnel at the time we visited with A&P personnel covering the reconciliation of the differences in cost between the New York and the Chicago market.

Q. In other words, you met with them twice during that period. [217] A. That is right, sir.

Q. I believe you testified yesterday that Commission Exhibit 19-A through H for identification was a memorandum covering the first of those visits? A. That is right, sir.

Q. I direct your attention to the sixth page of that memorandum which is Commission Exhibit 19-F, and particularly to the last paragraph on that page which commences with the sentence, "Schmidt expressed an interest factor—he hoped this private label program might be productive of $500,000 annually, which was the gross annual contribution of approximately ten good sized stores."

During your direct examination you were asked a question about a subsequent sentence in that paragraph insofar as what you recalled had happened in Wisconsin. Will you please tell the Hearing Examiner now to the best of your recollection what was said at the meeting with Mr. Schmidt that is reported in that paragraph? A. To the best of my recollection after Mr. Schmidt had indicated this computation and recognizing the fact my whole visit was tied into an attempt to provide some sort of—call it education, if you will, as to our business, I indicated to him that what he was looking at basically was tied to the current

out-of store price, and that some of the exposure I have had recently in Wisconsin in regard to private label milk [218] pointed out that that might not be the case, so that I didn't want him to assume in any way that $500,000 based upon current selling prices by A&P might hold up.

Q. Mr. Malone, what was your purpose in pointing this out to him? A. My purpose in pointing this out to him was two-fold. Number one, I think like the rest of us in Borden we had great pride in our own product. It was possible to negate that private label concept. We felt this was a good approach to the problem. Secondly, I wanted to make sure that in no instance did he believe he was guaranteed this sort of gross margin contribution.

Q. So that in part you were trying to do a little negative selling against the private label program? A. Yes, sir.

Q. On the other you want to make sure he didn't go away with any concept that any sort of an amount had been guaranteed to him? A. That is right.

Q. Now, the second meeting I think you referred to was with Mr. Bartels. A. Mr. Minkler had an appointment with Mr. Bartels.

Mr. White: Mr. Hearing Examiner, what designation does the Hearing Examiner prefer that Borden use with respect to exhibits?

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[224] * * *

By Mr. White:

Q. Mr. Malone, subsequent to the time that Borden commenced delivering private label to A&P, was it brought to your attention by anyone in the Borden organization that Borden had made offers to other store customers in the Chicago Metropolitan Area at prices similar to the private label prices being charged A&P by Borden? A. Yes, sir.

Q. Who would be one of the people that would come to your mind who brought this to your attention? A. The first contact that I know of was that Mr. Gose advised me that he was carrying on negotiations with the Kroger Company.

Q. Approximately in relationship to the time that Borden commenced serving A&P with private label, approximately in relation to that, how long was it after that? A. I would say it was recently subsequent to the delivery of private label milk to A&P.

Q. What, if anything, did Mr. Gose report to you about his negotiations with Kroger to sell Kroger milk and milk products at prices similar to those Borden was charging A&P for private label? A. He felt very positive about the negotiations as they progressed, but the final consummation of the negotiations is that Borden did not receive the business because the prices [225] that Borden offered were higher than Kroger was enjoying at that time.

Q. Who was supplying Kroger at that time? A. Bowman Dairy Company.

Q. This was in the Chicago Metropolitan area? A. That is correct, sir.

Q. Can you recall another instance where it was reported to you that Borden solicited another store customer in the Chicago Metropolitan area at prices similar to the private label prices that Borden was charging A&P? A. Yes, sir.

Q. Who was this that reported? Consolidated Foods Corporation.

Q. Who reported this to you, Mr. Malone? A. Mr. Gose.

Q. And the customer was Consolidated Foods? A. Yes, sir.

Q. Again using the point in time of the commencement of the service of private label to A&P as a point of reference, was this subsequent to that? A. It was subsequent to the Kroger approach.

Q. It was subsequent to the Kroger approach? A. Yes.

Hearing Examiner Schrup: You used the term "similar". What do you mean by that?

[226] Mr. White: I am using the words out of the complaint.

Hearing Examiner Schrup: You answered yes, similar. Were the exact prices quoted to you that were being used?

The Witness: I can't recall the exact prices, but it was similar, you know, generally close.

Mr. White: I derived my language from the complaint, Your Honor. That is the charge.

Hearing Examiner Schrup: Very well.

By Mr. White:

Q. Aside from Kroger and Consolidated Foods, was it brought to your attention that similar offers were made to any other customers? A. The National Tea Company.

Q. Who was the supplier of National Tea Company? A. Hawthorne Melody Dairy.

Q. This again was in the Chicago Metropolitan area? A. Yes, sir.

Q. What, if anything, were you told about the success of Borden's attempt to secure the National Tea business? A. We weren't successful.

Q. Was there any other customer, Mr. Malone, that was reported to you that an offer of this type was made to? A. These are the three I can distinctly remember.

Q. Mr. Malone, before, during, or after the negotiations with A&P concerning private label did you ever discuss with any [227] representative of A&P the price at which A&P was going to sell milk out of store? A. No, sir.

Q. Did you ever discuss during that period of time with any representative of A&P what they were selling milk out of store for? A. No, sir.

Q. And by milk, I am including milk byproducts. Is the answer the same? A. Yes.

Testimony of Joseph Malone

Q. During that period of time, namely, before, during, and after the negotiations on the private label for A&P, were you ever present when any representative of Borden discussed with A&P the price at which A&P was selling milk or milk products or the price it intended to sell milk or milk products out of store? A. No, sir.

Q. Did any representative of A&P directly to you or in your presence discuss the price at which A&P intended to sell milk and milk products out of store, or was actually selling such products out of store? A. No, sir.

Q. Were you ever present when an agreement was entered into between Borden and A&P concerning the price level at which a A&P would sell private label milk products out of store? [228] A. No, sir.

Q. Mr. Malone, my last series of questions has related to basically the private label product. Did you ever discuss with A&P at any time the price at which A&P was going to sell or was selling Borden label products out of store? A. No, sir.

Mr White: That is all, Your Honor.

Hearing Examiner Schrup: Off the record.

(Discussion off the record.)

Hearing Examiner Schrup: Before you start your cross-examination, Mr. McInerney, let's take a short recess. The witness has been on the stand for some time.

[229] Hearing Examiner Schrup: On the record.

Mr. McInerney: Before we commence our cross-examination, I would like to note briefly, as you know, it is A & P's position that this deposition is premature until we receive discovery from the Federal Trade Commission and from Borden which we have not yet received.

I understand Your Honor has overruled that objection. So we will proceed with our examination with that reservation.

Hearing Examiner Schrup: You may proceed.

Mr. Mathias: I would like the record to note at this point, Mr. Examiner, that Complaint Counsel in keeping with his statement at the last pre-trial on January 12, has made its records available and open to Respondent A & P, and Respondent Counsel for A & P has reviewed our files, and we are in the process of making copies of certain requested documents available to A & P.

Hearing Examiner Schrup: The record will so show.

You may proceed, Mr. McInerney.

Mr. McInerney: In the course of Mr. Malone's direct examination there was reference to an interview report which I would like to request that Commission Counsel turn over directly to us for purposes of cross-examination.

Hearing Examiner Schrup: I will have to look at the report.

* * * * *

[237] conferences with other people in Borden to which these memos refer? A. In some cases, yes, maybe, but others, no. I think in the cases where I was asked direct questions as to that, if I answered it in the positive, that meant that I had some recollection. I don't recall what instances they would be, but generally after seven years, I can assure you, sir, it is very difficult to have complete, you know, personal knowledge of what took place.

Q. I understand that. I was simply trying to clarify for the record whether you were repeating something from a piece of paper in front of you or whether you were giving us your present recollection of events. A. When I an-

swered on the direct any positive factor, I was answering due to my recollection of what took place.

Q. I believe you told us that none of the documents you have seen in the past two days here, in the time period we are discussing, related to any actual cost study of supplying A & P with private label milk in the Chicago area, is that correct? A. By cost study, you mean a sophisticated cost study which would go into the factor of, maybe, time, motion, and everything else that would be involved?

Q. Yes, sir. A. Yes, sir.

[238] Q. Also, I mean a study directed specifically to the cost of doing business with A & P as distinguished from other wholesale customers. A. That is right.

Q. In other words, there were no such study on the basis of which these documents were prepared? A. No.

Q. Directing your attention to Exhibit 13 which you have before you, I note that in various places you have used the language "estimated savings", "estimated adjustment", "estimated adjusted store wholesale profit per month", "estimated operating profit", and so on.

Looking, for example, at Exhibit 13-N, I note that there is a footnote with respect to container cost reads, "Same as St. Louis proposal," and there is a footnote with respect to production expense that reads, "Same as New York." Does that mean that in estimating those costs you used figures derived from St. Louis and from New York respectively? A. That was because of the fact that the Woodstock Plant was in the offing, that any data that I had here in Chicago really had no applicability. So these elements appeared to be more reasonable to use in the estimated development of the data and past history.

Q. So you used the figures that were used in quoting [239] prices in St. Louis with respect to container cost and the figures with respect to New York with respect to production expense? A. That is right, sir.

Testimony of Joseph Malone

Q. In making this study and similar studies such as the study that is reflected in Exhibit 17, you did not have sufficient experience with the Woodstock Plant on which to base any cost estimates with respect to what that plant might produce by way of efficiencies and so on? A. That is right, sir.

Q. Now, in Exhibit 17, and Commission Counsel can verify this by reference to Exhibit 17-L, you have used the same figures for container cost and production expenses. Does that indicate that at that time you were continuing to use the St. Louis cost and the New York cost with respect to that study? A. I think we used the—we were pretty consistent throughout the development of the data. Without comparing each one, I can't say exactly, but I think we were consistent, sir.

Q. I refer you to 13-F, Mr. Malone. In 13-F there are estimates for advertising and merchandising expense, general sales, administrative and district general operating and supervision, credit collection, other increases or deductions. And you have taken certain figures with respect to each of [240] those items and multiplied those by the number of points that were distributed from the wholesale routes from two of your branches. Is that correct? A. That is correct.

Q. Now, were those expenses set forth opposite each of the items that we have just recited based on any experience specifically with A & P? A. No, sir.

Q. Is it possible that the credit and collection expense, for example, for A & P would be much less than the figure shown there? A. I would say it would.

Q. With respect to the advertising and merchandising expense, if you were selling private label milk to A & P, is it possible that that item would either be reduced or eliminated? A. That is right, sir.

Q. So that these figures do not relate to the cost of

supplying A & P with private label milk, is that correct? A. We did not make any studies of A & P specifically.

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[248] with Mr. Schmidt on May 26, 1965, Mr. Malone, Mr. Mathias showed you a copy of Commission Exhibit for identification Number 4, which is a cost study regarding private label milk from Borden's Madison-Milwaukee plants and asked you to read some figures from that exhibit.

Can you tell us from the best of your information were those figures in Exhibit 4 shown to anyone from A & P at any time? A. Not by me, sir.

Q. Do you have any knowledge that it was? A. I have no knowledge that it was.

Q. As a result of your meeting with Mr. Schmidt on May 26 and what you had heard from others at Borden concerning him, would you say that Mr. Schmidt was a sophisticated buyer in the dairy business? A. I think he was a very good buyer in the dairy business.

Q. Did he know about the milk order market prices and the various components that you testified to? A. My visit with Mr. Schmidt at that meeting would have indicated to me that he wasn't totally familiar with the dairy economics that were involved in milk order regulations.

Q. And that is why he wanted to get some information from you with respect to the basic economics of the business, is that correct? A. My people the Borden executives, felt it would be [249] helpful if Mr. Schmidt did get a little more information in regard to milk marketing programs.

Q. Do you know if he ever acted as a buyer of milk or dairy products prior to this time? A. I wouldn't know, sir.

Q. Commission Exhibit 54 for identification, which has been shown to you previously, Mr. Malone, has a series of entries similar to the ones we discussed previously. That

is, it refers to local advertising expense, national advertising expense, general sales overhead, merchandising expense, and so on.

Now, am I correct that none of that would be applicable in sales of private label to A & P? A. That was the particular reason why I separated it here. I considered that it would not be applicable.

Q. Now, the first private label offered to A & P that was discussed here, I believe, was on the basis of a half cent a point, just in general terms and without reference to any particular package so that we don't get into that. A. Yes.

• • • • •

[255] The Witness: That is what I had answered, sir.

Hearing Examiner Schrup: Now, the question is whether you consider that you have an opinion as to how remote that time might have been between those other two parties.

Mr. McInerney: It seems to me that is a question that is obviously asked of a person that can't have had personal knowledge of it on the basis of his prior testimony.

Mr. Mathias: Your Honor, this witness is knowledgeable as to the procedures followed in the office of Borden. I think based on that knowledge he can state his opinion as to whether or not the meeting between Mr. Tarr and Mr. Schmidt, as in the case of this particular memorandum, was remote in time from the time the memorandum was prepared.

Hearing Examiner Schrup: Did these people that reported to you customarily report promptly?

The Witness: I had considered that they did, sir.

Mr. McInerney: Your Honor, this again is not on the basis of personal knowledge necessarily.

Testimony of Joseph Malone

Hearing Examiner Schrup: As you recall it, some seven years ago, was that the practice?

The Witness: As I recall it, some seven years ago, sir, I considered that they reported promptly. As of the date that they had their transaction, I am not qualified to say.

* * * * *

Testimony of Ralph R. Minkler

June 12-13, 1973

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[102] * * *

Q. Two percent milk? A. That is right, thank you.

Q. So that these products and possibly a few others would constitute the milk line of products and when you are discussing a milk plant you are discussing a plant that could— A. Could handle all of them.

Q. Now, did the Woodstock process make the entire milk line of products? A. Oh, yes.

Q. You had mentioned earlier that you probably started in the Woodstock area with the half gallons because this was a very important item.

Was the half gallon at this period of time in the mid-1960s your most important item in the Chicago area in terms of volume? A. I believe so.

Q. Did you also in the Chicago metropolitan area have any other types of facilities besides the processing plant such as distribution depots, receiving stations? A. Yes, we had a milk distribution location near O'Hare in Roseland. This was the spot where packaged product was [103] received from Woodstock after we got Woodstock going. The product was brought into this distributing location. It was palletized on the semis which brought it in and the product was moved into chill rooms right there and loads for retail and wholesale routes were then assembled and sent out from that distributing location.

Q. This would be on smaller trucks? A. That is right.

Q. Did you also have a distribution station in Hammond? A. Yes.

Q. And this would be following the— A. Similar pattern.

Q. Do you recall approximately what distribution area

was served out of the Hammond distribution center? A. Well, the northwest corner of Indiana including South Bend and the southwestern corner of Michigan were served out of there. Hammond, Gary.

Q. Did any portion of the milk supplied to Hammond come back into Illinois on routes adjacent to the Indiana line by any chance? A. I don't think so. I am not sure about that. I really don't know.

* * * * *

[111] * * *

By Mr. Mathias:

Q. From the mid-1960, 1964 and 1965, what was the position of Joseph Malone in the Chicago Central District? A. Well in 1964-65 specifically he was a Vice President with the title Vice President Regulatory Controls.

Q. And in this position what were his duties? A. He was primarily involved with keeping abreast of any state or federal regulations affecting our business and consulting with our people and conformance and interpretation, that sort of thing.

Q. Now, did he serve directly under you or did he serve under some other head in this division? A. He served under me.

Q. So Mr. Malone reported directly to you? A. That is right.

Q. At this period of time, was he a part of the management group of the Chicago Central District? A. Oh, yes.

Q. Did he participate in matters and problems other than governmental controls? A. He did considerable cost analysis that was required from time to time.

Q. This would be in connection with any matter that you required cost accounting? [112] A. That is right.

Q. Was Mr. Malone your principal advisor insofar as

cost problems were concerned in the District? A. Yes, he was.

Q. And did he have any other duties aside from these cost accounting duties and his duties as a consultant on governmental and state controls? A. Well, just in a general sense he was as you have already asked me if he was a part of the management group. He certainly was. He was involved in decision making discussions and as to additional specific assignments I guess I can't answer you.

I don't know just what you mean.

Q. Well, as a part of the management group if there was a major problem of any type involving the Chicago Central District, was he involved in discussions? A. Yes, he was.

Q. And was this considered a part of his duties with the Chicago Central District to consult and participate in such problems? A. Absolutely.

Q. Now, prior to being appointed Vice President of Regulatory Controls, in what position did Mr. Malone serve? A. For a number of years he was District Comptroller. He was the top accountant for the District.

* * * * *

[120] * * *

Q. In comparison to A&P as a customer, your sales to the Kroeger Company stores, how would they compare to the A&P sales in general? A. Much less in the Chicago metropolitan markets. Much less.

Judge Hinkes: Which would be much less?

The Witness: The Kroeger sales would be much less than the sales through A&P.

By Mr. Mathias:

Q. Borden did not serve all the Kroeger stores in the Chicago area, did they, sir? A. No, they did not.

Q. Were the Kroeger stores sales limited to any particular areas or were they spread throughout the entire

metropolitan area? A. The stores that we had, if I recall correctly, were primarily in the suburban areas, the Kroeger stores.

Q. Who served Kroeger, if you recall, within the Chicago City area? A. I believe it was largely Bowman.

* * * * *

[184] Judge Hinkes: Consistent with my ruling, I must receive these documents in evidence, and the objection is overruled.

(Commission Exhibit 12-A and B and Commission Exhibit 14-A through E were received in evidence.)

By Mr. Mathias:

Q. Mr. Minkler, I show you Commission Exhibit 13-A through N for identification and ask you to briefly familiarize yourself with this document, sir.

Judge Hinkes: Off the record.

(Discussion off the record.)

Judge Hinkes: On the record.

Mr. Mathias, you have not offered your Exhibit 8, is that correct?

Mr. Mathias: No, Your Honor, I have not offered it yet.

Judge Hinkes: Very well.

By Mr. Mathias:

Q. Mr. Minkler, can you identify handwriting on Commission Exhibit 13-A through N for identification? A. Yes.

Q. Whose handwriting is it, sir? A. It is Joe Malone's handwriting.

Testimony of Ralph R. Minkler

Q. Are you familiar with this document? A. No, I would have to study it. This would take me some * * *

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[193] Mr. White: I was referring to 0011 at the bottom of the page, Your Honor, per half-gallon.

Judge Hinkes: Yes.

Mr. White: But yes, that is right, if you are taking the—

Judge Hinkes: Yes, I see where it has been multiplied, in effect, by 4.

Mr. White: Yes, sir.

Judge Hinkes: You may continue, Mr. Mathias.

Mr. Mathias: Your Honor, I offer Commission Exhibit 18-A through P in evidence.

Mr. McInerney: No objection, Your Honor.

Judge Hinkes: Without objection, it is received.

(Commission Exhibit 18-A through P was received in evidence.)

By Mr. Mathias:

Q. Mr. Minkler, I hand you Commission Exhibit 19-A through H for identification and ask you to familiarize yourself with this document, sir.

Do you know who prepared this memorandum, Mr. Minkler? A. Yes.

Q. Who prepared it, sir? A. Joe Malone.

Q. And was it submitted to you? A. Yes, it was.

* * * * *

[200] * * *

By Mr. Mathias:

Q. Mr. Minkler, I hand you Commission Exhibit 21-A through U for identification and ask you to familiarize yourself with this document, sir.

Testimony of Ralph R. Minkler

Mr. Minkler, are you familiar with Commission Exhibit 21-A through U? A. I have just been refreshing my memory on it, yes. It is another quotation.

Q. What is this document, sir? A. It is a quotation, another quotation submitted to A & P.

Q. And was this submitted to A & P on or about the date shown on the various pages revised July 26, 1965? A. I am sure it was.

Q. What was the purpose of this revised quotation, sir? A. Again to bring out all the details pertaining to areas 2, 3, 4, 5, and 6, and it is again a sales tool, this last schedule or the last sheet, used in an effort to try to sell the customer on the tightness of our quotation.

Mr. McInerney: May the record note that the witness is referring to 21-U as the last sheet.

The Witness: That is right.

By Mr. Mathias:

Q. 21-A through T, I take it, sir, are the particulars of the quotation you made to A & P at that time? [201] A. That is right.

Q. And this again did not relate to area No. 1, the Chicago-Calumet area, is that right, sir? A. That is right.

Q. And I take it then, that your earlier offer, the February offer, was still in effect for that area? A. I believe that is right.

Judge Hinkes: Was this also communicated to A & P?

The Witness: Yes.

Judge Hinkes: By whom?

The Witness: By Gordon Tarr.

Mr. Mathias: I will offer Commission Exhibit 21-A through U into evidence.

Mr. McInerney: No objection, Your Honor.

Judge Hinkes: It is received.

(Commission Exhibit 21-A through U was received in evidence.)

By Mr. Mathias:

Q. Mr. Minkler, I hand you Commission Exhibit 23-A through I for identification, 24-A through F for identification, 25-A 26, 27 and 28 for identification and ask you to familiarize yourself with these documents, sir.

I would like to add to that list 24-G, which I accidently omitted.

Mr. Minkler, can you identify these various documents? [202] A. To a certain extent, yes. They are a study comparing New York cost of milk with Chicago's.

Q. Under what circumstances was this study prepared? A. I can't recall the exact manner in which it came up, but I will give it to you broadly. Ira Bartels stated, I believe, to Joe Malone, though it may have been to Gordon Tarr, this was sometime after he had presumably—excuse me, I have to presume a little—looked over these last quotations that you just showed me.

Q. That is Commission Exhibit 21 that was just handed to you. A. Right, and the thought was expressed for one reason or another that he would certainly like to see a comparison between what we had been quoting and what was in effect in New York City, and I think this was about the last of July or very early in August.

At any rate, Joe Malone went to New York and spent four or five days and put all of this together.

Q. And what happened then? A. Then—and again I am hazy as to a lot of specific detail, but, in effect, this is what happened.

Mr. McInerney: Excuse me, Mr. Minkler. I didn't want to interrupt you before, but I think no one wants you to speculate.

The Witness: Wait a minute. I can tell you what [203] happened in this respect. Malone went to see Bartels to discuss this and explain it to him, and by that time, Bartels just took the attitude well, I am not interested in that. Yes, all right, I may have asked for it, but that is'nt what I am interested in.

I am interested in the best price I can get for a private label milk. This is clearly my recollection. I can't give you specific details as to times or all of the conversation, but that is what it amounted to.

By Mr. Mathias:

Q. Mr. Minkler, you were present, were you not, at the delivery of this document to Mr. Bartels? A. It is my recollection that both Malone and I went up there and were greatly surprised at his reaction. He didn't want it any more.

Mr. McInerney: May we know whether the answer is that it was delivered or it wasn't?

The Witness: It was delivered. It was delivered.

Mr. Mathias: I move Commission Exhibits 23-A through I, 24-A through G, 25-A, 26, 27 and 28 be received in evidence.

Mr. McInerney: Your Honor, may we know from Mr. Minkler whether his recollection is that all of

these documents, to which Commission Counsel has just referred, were actually delivered to Mr. Bartels?

Judge Hinkes: Can you tell us, Mr. Minkler?

[204] The Witness: I can't tell you. I know they were taken there, but I don't know how many he kept.

Mr. Mathias: Your Honor, if Complaint Counsel may interpose for a moment, I believe that I can identify each and every one of these documents as having—correction—with the exception of 24-F and G, which I am willing to retract from my offer—each and every one of the documents mentioned were received from A & P's files in response to a subpoena duces tecum.

Mr. McInerney: I believe that is correct, Your Honor. We don't know when A & P received them. That is all.

Mr. Mathias: The witness has pretty clearly stated that he personally, along with Mr. Malone, delivered them, he believed, in August of 1965. I think that is close enough.

Judge Hinkes: Is that correct, Mr. Minkler?

The Witness: Late July or early August is the best that I can give you.

Mr. McInerney: But you are not sure, Mr. Minkler, as to whether each of these pieces of paper that are before you were delivered, is that correct?

The Witness: That is correct.

Judge Hinkes: Then, what can you tell us? What do you mean that you are not sure whether they were delivered?

The Witness: I just started to say that Mr. Mathias has answered that. He said they came from A & P's files, so [205] they were left.

Judge Hinkes: What is your recollection when you went up there and saw Bartels?

The Witness: My recollection is that he disdained all interest in this.

Judge Hinkes: Did you make a proffer of those documents, all of those documents?

The Witness: Of course we did. And I don't recall—I didn't recall—that is what I mean. I did not recall whether he kept them or not. I wasn't sure.

Judge Hinkes: Then as I understand it, this witness states categorically, that he offered these documents to A & P.

The Witness: That is correct.

Mr. McInerney: He seems to be relying in part, Your Honor, on Mr. Mathias's statement that A & P had some of these in their files.

The Witness: No, I am relying on the fact that they came from A & P's files. The inference is clear. A & P didn't get it out of thin air.

Mr. McInerney: Your Honor, we might have gotten them in the course of the investigation.

Judge Hinkes: That is right, but I think the documents are admissible. Make your argument upon the timing as you see fit.

* * * * *

[213] * * *

By Mr. Mathias:

Q. Do you recall the question, now, Mr. Minkler? A. What do you mean by unrealistic pricing? Yes.

Q. Just what do you mean by it, sir? A. We were, as I started to explain, concerned about the approach that competitors might make. One approach that we specially were worried about was the possibility of a competitor being so anxious to get this business that they would approach it on the basis of quoting price built up on direct costs

only, that is, leaving out all fixed charges on the theory that fixed charges were already met by their present business.

We call that, for want of a better name, anyhow accounting. In other words, you have your fixed costs all taken care of by the volume of business that you presently have, and here is a nice choice hunk of business up for grabs, so you go in and raw milk is so much, the package is so much, the processing is so much and delivery is so much, and there is a chance that someone might approach this business on that basis and bid extremely low.

Q. Did you express this concern to A & P, sir? A. Yes, we did, and I can't exactly pinpoint from recollection how and when it was done, but it was done during conversations pertaining to their asking for additional bids. They told us they were going to ask for bids, and right away, Gordon Tarr, [214] because we had discussed this in our office, pointed out that they could get unrealistic prices on this kind of an approach.

Q. Did you have any discussions during this period with Mr. Bartels? A. Yes, I did. I had one discussion with him along the same lines, and he said that the only way that they could insure getting the best price possible was to ask for competitive bids.

Q. Mr. Minkler, I hand you Commission Exhibit 43-A through C. First I ask if you can identify the handwriting on Commission Exhibit 43-A? A. That is Malone's.

Q. I would like you to read Commission Exhibit 43-B and C for identification for the purpose of refreshing your memory, if you can, as to the circumstances surrounding the meeting between you and Mr. Bartels to which you have just referred.

Mr. McInerney: Excuse me, Mr. Minkler. Before you do that, I would like to object to this procedure.

I think that the proper way is to see whether his memory needs any refreshing before any document is shown to him.

Judge Hinkes: Yes.

Mr. Mathias: I withdraw the last question.

• • • • •

[222] Judge Hinkes: No the document is admissible. Whether or not it has any impact upon Respondent A & P, however, is another question, and if it hasn't been communicated to A & P, it is going to be difficult, as I see it, to fasten A & P with any responsibility for the data contained in it.

The Witness: It certainly wasn't submitted to A & P. It was for internal use.

Judge Hinkes: In any event, then 37-A through F is received, 36-A through Z-8 is received, and 42-A through D is received.

(Commission's Exhibits 37-A through F, 36-A through Z-8 and 42-A through D are received.)

Mr. White: I understand with respect to 36-A through Z-8, that it is received except for the handwriting on it.

Judge Hinkes: Yes, that does not include any of the handwritten portions.

By Mr. Mathias:

Q. Mr. Minkler, you have testified concerning the notice from A & P of the decision to seek competitive bids and of your meeting with Mr. Bartels. What was the next event in the course of your dealings with A & P? A. I believe the next event was that Elmer Schmidt called Gordon Tarr—I can't give you the exact date. It certainly was after the middle of August, very close to the middle of August—and said Gordon, I want you to come up here

right [223] away, and when Gordon went to the A & P office, he encountered a gentleman who was pretty distraught.

This is what Gordon Tarr reported to me, that Elmer Schmidt told him that he was terribly shocked, that they had received quotations which made ours appear—now I am not going to give you the exact words. I don't know the exact words, but it meant that it made ours appear ridiculous, and he just couldn't understand that.

He said, considering the fact that Borden had been a supplier of A & P for many years, and that the relationship had always been very friendly and cooperative, and that they had fully expected when they asked us to quote on private label, that they would get a sound price from us, but it didn't happen that way.

We have prices that are much better, from the standpoint of what they yield for us in savings, than your last quotation in which you detailed our savings at $410,000.

Q. Was there any indication of how much below your offer the competitive offer was? A. No, there was not, but Gordon Tarr, struggling of course and trying to think of what he might do to salvage it and get Schmidt in a better frame of mind, said something to the effect that, all right, maybe we have overlooked something here. It is conceivable that we might further anticipate a reduction in in-store promotional activities, that if we were to eliminate [224] the practice of putting up display material and rearranging product in cases and things of that nature, which we lumped together and called in-store service, if we were to eliminate that, maybe we could increase this $410,000 figure by $50,000, and whereupon, Elmer Schmidt told him that that wouldn't begin to cover the differences between our quotation and the competitive offers that he had.

Q. Did you later attend a meeting yourself with Mr. Schmidt and Mr. Tarr? A. Yes, I did.

Q. And did Mr. Tarr ask Mr. Schmidt to repeat these remarks to you? A. Oh, yes.

Q. And did he do so? A. He did. He did.

Q. What happened after Mr. Tarr came back and reported this meeting to you? What did your group do then? A. We got on the phone with New York, is what we did next.

Q. And what was the result of that discussion? A. I can't detail that exactly for you, but we were certainly reporting, just the way I have tried to describe to you, what had happened and that we still felt that we could go back there if we did it quickly. Elmer Schmidt at least didn't say I don't want to see you again. Gordon left it that, well now, just hold your horses a bit. I want to get back to our office [225] and see my associates, and I again can't give you the exact detailing of this, but at any rate, Gordon came back and we felt that there was a possibility, based upon the relationship we had had over a period of time, that we could still talk further if we had anything important to say.

Q. Was there any indication by Mr. Schmidt as to how many competitive offer or offers that we had? A. All I know is that it was plural. He didn't say a bidder or an offer. He said quotations, plural.

Q. Following your discussion with the New York office, what steps did you take to retain the A & P business? A. This became not a matter of logic in many respects. It was a matter of struggling to try to guess again what might have been put in there by a competitor. I must tell you that it was just largely pure guess. We had the $410,000 figure in, we were clearly told that an additional $50,000 wouldn't begin to cover the difference, there are a facts that we had to consider.

In addition to that, we had had this figure of one million six hundred some thousand dollars that it would cost us if

we lost the business. We had to weigh that, and at some point, I said that it seemed to me that we had to consider doubling this $410,000 figure, and you could ask me all night how I arrived at that, and I wouldn't be able to tell you except that we were just determined that we had to save this volume [226] for this brand-new plant that we were just bringing on stream.

We were really desperate and by that time, we were pretty well convinced that the approach by the competitor had been on an anyhow accounting basis, they were going to get it and correct their problem later on, we rationalized, so I again got New York on the phone and got their clearance if I thought this was all that could be done to go ahead.

I was told, save the business, and so Gordon Tarr—I had Gordon make an appointment again with Elmer Schmidt, and we went up there and this is when Gordon asked Schmidt to again relate, to go back over what he had said to Gordon about our $410,000 quotation.

> Mr. McInerney: Excuse me, I hadn't wanted to interrupt the witness' story before, but two things: I take it that this last testimony, Mr. Minkler, is the same meeting—
>
> Mr. Mathias: Excuse me, Your Honor, I object to Mr. McInerney interrupting my interrogation of this witness. If he has an objection to make, let him make it.
>
> Mr. McInerney: Yes, I will make it. I would move to strike that part of the witness' answer that starts, we were pretty well convinced that other people were offering or making an offer on the basis of anyhow accounting, or words to that effect—I don't have the verbatim in my notes—since there has been no testimony that that was the subject of a communication from the Borden Company to A & P,

other than the [227] previous testimony with respect that somebody might come in with a bid based on anyhow accounting. But I don't believe that—I think what the witness was doing on this occasion was again reciting the operations of the mind of the Borden Company people.

Judge Hinkes: Yes. The witness has testified that at one point A & P was told that others might come in and overlook their fixed cost and give a very low price. The witness has further said that he thought others had done so when he was told by A & P that they had some very low bids. But that has not been at least so far, communicated by Borden to A & P.

Mr. Mathias: Your Honor, there was the past communication to A & P by the witness that competitors could be expected to come in with a bid based on anyhow accounting, but I would like to ask one additional question.

By Mr. Mathias:

Q. At this meeting that you are now discussing with Mr. Schmidt at which you and Mr. Tarr met with Mr. Schmidt, did you mention the subject of anyhow accounting at that meeting, Mr. Minkler? A. I don't recollect that I did.

Q. Did you make an alternate offer to Mr. Schmidt at this time? Did you offer the $820,000 savings? A. I did.

Q. And what did you mention to Mr. Schmidt as the basis upon which this offer was made?

[228] Mr. McInerney: Excuse me, Your Honor. I think we are again at a point where it is inappropriate to lead the witness. I think the question ought to be what was said and done.

Judge Hinkes: Yes. If this is critical, by all means let's be careful.

Testimony of Ralph R. Minkler

By Mr. Mathias:

Q. What did you say to Mr. Schmidt when you made this new offer? A. I said, Elmer, we simply cannot lose this business. Now I don't know what approach anyone else had made, but you have made it clear to Gordon Tarr and to me that there is a very substantial difference between our quotations and the quotations that you got from someone else, and since you covered this with Gordon we have done a tremendous amount of discussing of this situation. We have got to hold this business. I am prepared today to tell you that we will double the savings figures that we submitted to you on the 13th. That will be $820,000.

Q. Did you say anything else to Mr. Schmidt at this particular time concerning the basis of your offer? A. It is my recollection that the only thing I said was that we had no way of knowing really what had been offered to him, but we were doing this on the basis of meeting competition. This is what we hoped we were doing.

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[238] • • •

The Witness: I understand.

Judge Hinkes: Now then, did you raise the question then of competitors pricing?

The Witness: I am sure I did, yes.

Judge Hinkes: How?

The Witness: In a general way. I don't know how I can say how. I know that I was trying to still appear logical from our standpoint. I was in a way half embarrassed not to be able to know what kind of a bid they might have, but obviously you couldn't ask, and you couldn't have gotten an answer if you did, so—

Testimony of Ralph R. Minkler

By Mr. Mathias:

Q. Well, in the course of this discussion did you at any time mention the phrase, "anyhow accounting" to Mr. Schmidt in this discussion? A. I am sure that this phrase was mentioned sometime, but I don't know whether it was mentioned at this particular time.

Q. You have no present recollection of that. A. No, I do not.

Mr. Mathias: Your Honor, I move that pages 200 through 209 of the deposition transcript be received in evidence as corrected as CX 260 with appropriate subparts.

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[243] Did we get the sub-lettering for that?

Mr. Mathias: A through J, Your Honor. That was correct.

Judge Hinkes: Very good.

260 A through J is received, being the deposition pages 200 through 209.

(Commission Exhibit 260 A through J was marked for identification and received into evidence.)

Mr. McInerney: May I remind Your Honor—and I apologize. I won't keep at this—but I would like to remind you that I had offered to bring in a portion of the deposition which is inconsistent with the purpose for which this is being offered and which I think would cover Your Honor's point with respect to a denial.

Judge Hinkes: You will have that opportunity and again if I was wrong the motion to strike is always available, and I will be glad to entertain it upon a proper showing.

Testimony of Ralph R. Minkler

By Mr. Mathias:

Q. Now, Mr. Minkler, was anything stated at this meeting then concerning the spread of this $820,000 to the product line? A. Yes.

Q. What was said in this regard, sir? A. Go back and spread it and let me see it. This sounds very interesting.

[244] Q. And what did you do at this point, Mr. Minkler? A. We went back to the office and immediately went to work spreading it to various items and the various areas.

Judge Hinkes: This might be an appropriate time for a break.

Mr. Mathias: Yes, I think it might be, sir. We have been trying to line up our final exhibits for today, and I think we are sufficiently along with the witness so that we will be able to have made meaningful progress by seven, and possibly we could start at ten o'clock in the morning to give us all a few minutes extra rest.

Judge Hinkes: Well, in any event we will take a short break at this time and we will expect to break off for the day at around 7:00 o'clock, and we will talk about the time to resume tomorrow then.

(Brief recess taken.)

Judge Hinkes: On the record.
You may continue. Mr. Mathias.

By Mr. Mathias:

Q. I hand you Commission Exhibit 56 A through X and ask you to familiarize yourself with this document, sir. A. Yes, Mr. Mathias, I recognize it.

Q. Are you familiar with this document? A. I am.

Q. What is it, sir? [245] A. It is a spread of the $820,000 to various items, including glass gallons.

Testimony of Ralph R. Minkler

Q. Was this quotation tendered to A & P? A. Gordon Tarr and I either on the 14th or 15th went up to A & P with this intending to give it to Elmer Schmidt and he was not there. His wife was expecting a baby and he was home. So we gave the bid to his assistant. His name is Hall, Robert Hall. Bob Hall, I think. We gave it to him, and he said that he would see to it that Mr. Schmidt got the figures promptly.

Q. Now the glass gallons was a new item in your quotation, was it not, sir? A. We thought when we went back after that meeting where we first mentioned the $820,000, we reasoned that we could put part of this spread part of this to glass gallons. They had at some time or other said that they thought the glass ought to be private labeled too, and we had some discussions about that because it wasn't very apparent how a glass jug could be made to convey a different label. All you had to work with was a small plug tab that went in the top of the glass bottle which you would change from Borden's to A & P or Ann Page, whatever they wanted.

So in putting this detail together we decided that well, we would put part of it on the glass containers and that is the way we gave it to this Mr. Schmidt, and Mr. Schmidt very shortly called Gordon Tarr and said this glass thing won't do [246] at all. You put a cover in here now, he says, I can't compare your detailing to detailing I have from other bids because glass gallons were not covered in the other bids.

Q. Mr. Minkler, you used the date of your original meeting with Mr. Hall as the 14th or 15th? A. Or 16th, I don't know when.

Q. For clarification purposes this was in September of '65? A. Oh, yes.

Mr. Mathias: I move Commissions Exhibit 56 A through X into evidence.

Judge Hinkes: Is there objection?
Mr. McInerney: No, Your Honor.
Judge Hinkes: It is received.

(Commission Exhibit 56 A through X, previously marked for identification, was received in evidence.)

By Mr. Mathias:

Q. Now, what occurred after you received word from Mr. Schmidt that the glass gallons were not acceptable? A. We immediately took them out of the picture and spread the $820,000 to the other items.

Q. This is the items that you had been previously negotiating with A & P on? A. That is right.

Q. I hand you now Commission Exhibit 62 A through Z and ask [247] you to familiarize yourself with this document, sir. A. Yes, I recognize it.

Q. What is this document, sir? A. This is the final quotation with the A & P savings spread to the private label items and to the various areas.

Q. Now, how was this final quotation tendered to A & P, sir? A. Gordon Tarr and I arranged to meet Elmer Schmidt out in his home village Libertyville. His wife had presented him with a new youngster and he was staying home for a few days, and we made a date to meet him at a VFW Hall, I guess he was an officer in it, anyhow, he had a key to it. We met there. We were the only ones there.

Q. And what occurred at this meeting, sir? A. I told him, apologized first for having put the glass gallons in the picture, but I told him that we had a mistaken impression that he might like that, and we are perfectly satisfied to take them out and that now the $880,000 had been spread to the same items as in our previous quotation and I gave this to him. He looked it over and said, "Well, this certainly looks like that is the way it should be," and he said, "this

is fine. I am very pleased. I will recommend to my superiors that we proceed on this basis, and I am very happy that I can do that."

Q. And what did you say to him on this occasion, Mr. Minkler? A. Well, I thanked him for being patient with us, but I said, [248] "Elmer, there is certainly something here that I want you to very definitely understand." I said, "This price is given to you by us on the feeling and belief that we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis. You must make that clear to your superiors and to your legal people. I don't know what may come of this in the future, but I want you to understand this we are going to say always that we felt we were meeting a competitive offer that you had received from someone else." And he said to me, words to the effect, "Ralph, you don't need to worry. I read you loud and clear. I understand what you are saying. My superiors and our legal department will understand it." And he says, "Just don't worry about it".

Q. Now, Mr. Minkler, at that time that you made this statement to Mr. Schmidt did you ask him to save the competitive offers? A. Oh, I did. I certainly did. I said it is tremendously important that you save the quotations that you had from competitors. They will conceivably be extremely important sometime in the future, and he says, "They will be saved."

Q. Mr. Minkler, in connection with your earlier testimony you mentioned the amount of $880,000, whereas previously all of your mentions had been to savings of $820,000. Would you explain any apparent inconsistency here, sir? A. I don't know that I can offhand. I think that it is the way the volume worked out.

* * * * *

[253] Judge Hinkes: Is there any objection?
Mr. McInerney: No objection.

Testimony of Ralph R. Minkler

Judge Hinkes: 62-A through Z-2 is received.

(The documents referred to, heretofore marked for identification Commission's Exhibits 62-A through Z-2 were received in evidence.)

By Mr. Mathias:

Q. Mr. Minkler, I hand you Commission Exhibit 54-A and B for identification and ask you to familiarize yourself with this document. A. Well, this is again a computation, mathematic, by Joe Maloney.

Q. Have you seen this document before, Mr. Minkler? A. Oh, I believe I have but I don't recollect it specifically. I would have to study it.

Q. Mr. Minkler, I also hand you Commission Exhibit 55-A through E, which is two handwritten pages and a three-page typewritten transcription thereof, and ask you to read this document to see if it refreshes your memory as to the circumstances surrounding 54-A and B.

Mr. McInerney: The witness is being asked to read this for what purpose?

Mr. Mathias: To determine if it refreshes his memory concerning the preparation and meaning of Commission Exhibit 54-A and B.

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[293] * * *

Q. Mr. Minkler, yesterday in questioning you concerning Commission Exhibit 62-B, there was some discussion concerning the total figure appearing on this page which is $882,837.

Does the reading of Commission Exhibit 64-A and B refresh your memory as to the meaning of this figure? A. It clearly explains it.

Q. I see.

But you have no recollection other than the letter, itself? A. Only in a general sense.

Mr. Mathias: Move Commission Exhibit 64-A and B into evidence.

Mr. McInerney: Our position is the same as before, Your Honor. We have no objection at this time.

Mr. White: Again I assume this is without the unidentified handwriting.

Judge Hinkes: Correct.

The exhibit is received.

(The paper referred to, heretofore marked for identification Commission's Exhibit 64-A and B, was received in evidence.)

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[330] * * *

Q. What loss of dollar income are you referring to, Mr. Minkler? A. I am referring to the fact that we have just agreed to a reduction in price to A&P for private label.

Q. Sir, I call your attention to the fact that this is a letter dated December 28, 1964. A. Okay, it is still—all right. We hadn't got to the $820,000 point as yet by a long ways, but we knew we were going to have to reduce our selling price on private label. It was going to cost us something.

Q. And you were telling Mr. Archer that there were also some savings that were anticipated? A. That is right.

Q. Was there ever a study made up until the time you made the final offer to A&P, or subsequently while you were at the Borden Company, as to what the actual cost was of supplying A&P private label from the Woodstock

plant, to the best of your knowledge? A. No time and motion cost analysis, no. Projections, yes.

Q. As of what date? A. I can't tell you. During the period of these discussions, Joe Malone put data together.

Q. But not as a result of any experience with A&P from [331] Woodstock on private label? A. It was a projection.

Q. I am sorry? A. It had to be a projection, yes, sir.

Q. Thank you. Now, do you know of any studies based on actual experience? A. With reference to this?

Q. With reference to supplying A&P with private label milk from Woodstock plant. A. No.

Q. I believe you told Mr. Mathias that shortly after A&P had accepted Borden's private label quotation, you turned to the project of consolidating Borden's Chicago and Columbus divisions? A. That is right, sir.

Q. Now, when did that project first come under consideration at Borden? A. It came under consideration about November 1—now that, don't pin me down to the actual day, but about the time that we started delivering private label to A&P which was November 1, 2, 3 or 4, along in there, of 1965.

Q. And no consideration or discussions about it prior to that time, is that what you are telling us? A. That is right.

* * * * *

[339] * * *

What would a difference of between seven and eight cents per hundredweight convert into on the basis of mills per half gallon according to that table which is 6-C, or 62-N? A. Per half gallon?

Q. Yes, sir. A. Seven cents is indicated as decimal point 003.

Q. And .8 cents? A. Decimal point 0034.

Q. So somewhere between three mills and 3.4 mills per half gallon, is that correct? A. That is right.

Q. Now, if A&P had asked Borden for 3.5 percent butterfat content milk, what would the additional cost to the A&P have been? A. The additional cost—

Q. Per half gallon. A. To A&P, per hundred pounds, would have been decimal point 0740.

Q. And per half gallon, sir? A. (No response.)

Q. Just give us the range. A. First we have a computation here on 6-B, of the change in cost when you move from a 3.5 to a 3.4 percent butterfat, and it is seven cents, four mills, per hundredweight now, divide [340] that by—

Q. Mr. Minkler, I think we can shorten it if you refer to the table on 6-C. A. All right. Again are we on half gallons?

Q. Yes, sir. It doesn't have to be precise. Is it between three mills and 3.4 mills per half gallon? A. Yes.

Q. Somewhere between those two figures? A. Yes.

Q. That there would have been, that would have been an increase in price if the butterfat content being supplied by Borden to A&P had been 3.5 instead of 3.4, is that correct? A. Yes.

Q. Thank you. Now, Mr. Mathias showed you a document that has been marked 16-B, and while they are getting that out, let me ask you is it true that A&P requested Borden to give it a private label quotation to be built up from the costs of raw milk, adding on costs for containers, processing, and delivery separately, as well as a profit, instead of merely giving an arbitrary differential from the price of Borden brand milk? A. No, I never said that it was, that they asked for it. If that is what I—I guess I don't understand your question.

* * * * *

Testimony of Ralph R. Minkler

[354] * * *

By Mr. McInerney:

Q. Do you have any idea what, if anything, A&P saved as a result of private label? A. No, I do not.

Q. You were shown by Mr. Mathias two exhibits which have been offered and received in evidence. One is 18-O, and the other is 21-U, and those are before you now? A. Yes, sir.

Q. I think you described both of these as sales tools used to try to convince the customer A&P that it was getting a good deal, is that correct? A. I believe so, sir.

Q. Now, the earliest of these is 18-O, dated May 25, 1965, and a later one is 21-U, which says "revised July 26, 1965." A. Yes.

Q. Do you know if there was any difference in the prices on which these two quotations were submitted? A. No, I don't know.

Q. Well, if there was a difference, would it have been a reduction rather than an increase as to the later document? A. Here is May, here is July, I just have to study it out.

Q. Well, I don't want to. The only way that I can do that for you quickly, Mr. Minkler, and I am trying not to take too much time up on this is to ask you to compare, for example, 18C [355] and 21C, that may help. A. 18C, all right, and 21C.

Both of them are based on a Class I price of $4.32.

Q. Well, the prices on the exhibit which are marked 21C are either the same as or lower than the prices on 18C, would you say? A. For—now, just a minute. On 21C we have three-day, four-day, five-day, six-day delivery.

Q. Well, Mr. Minkler, let me pursue another line, because I don't want to take up too much time.

These documents, of course, have numbers in them that can be examined at a later time. A. O.K.

Q. Would you look at 180 and 21U? A. 180 and 21U, yes, sir.

Q. Now, in the column marked "Borden Gross Profit per Quart" on 180? A. Yes, sir.

Q. At the bottom of that column is a figure that appears to be nine-tenths of a mill? A. That's right.

Q. Now, in the half gallon column it appears to be six-tenths of a mill? A. Now, just let me find it. On the same? I haven't located it. Oh, yes, all right; the six-tenths of a mill.

[356] Q. Yes. A. Right.

Q. Now, the comparable figures on 21U under "Borden Gross Profit per Quart" show one cent—no, I am sorry, 19 mills, do they not, under the "Borden Gross Profit per Quart," which compares to nine-tenths of a mill on 180, is that correct? A. That is correct.

Q. And on the half gallon, instead of six-tenths of a mill, the figure is two mills gross profit per quart? A. That is right.

Q. Now, can you tell us why the Borden gross profit per quart would have increased between May 25, 1965 and July 26, 1965?

Mr. Mathias: Your Honor, I object. I don't believe a proper foundation has been laid for this question. There is no showing that the figures are comparable in any way. I see many different figures on this sheet. They don't appear to be dealing with the same sales figures.

Mr. McInerney: You can argue about this later on, Mr. Mathias. I would like to not interfere with the witness' concentration.

Judge Hinkes: You may continue.

The Witness: I can't give you the reason for this off-hand. It isn't apparent to me.

By Mr. McInerney:

Q. Do the figures appear to be talking about comparable items, [357] that is, gross profit per quart in each case? A. Borden's gross profit per quart, Borden's gross profit per quart, yes, according to the headings.

Q. Now, how does that compare with the figure you referred to previously on that, the half gallon? These figures show six-tenths of a mill on the half gallon May 26, 1965, and two mills a half gallon on July 26, 1965. Do those figures appear to be comparable? A. They seem to be covering the same item, yes. That is all I can tell you.

Q. And yet in the later quotation it would appear that Borden is making more profits both on the half gallon and in total, is that correct? A. That appears to be right. And I can't tell you why.

Q. Can you tell us how this compares, or is it comparable at all, with the figure that you mentioned before about a half-cent a half gallon with respect to the quotation for the Chicago-Calumet area? A. I don't follow your question.

Q. Well, I think you told us before that looking at a quotation on or about February 9 that I believe was carried through to this period of time that we are talking about now that your anticipated gross profit per half gallon on that quotation was over a half a cent a half gallon. Do you recall saying that? A. No, I don't.

[358] Q. Now, the purpose of these schedules that we are looking at, 180 and 21U, were an attempt to convince A & P that they were getting a very low cost, isn't that correct? A. It is a sales tool, yes.

Q. Did A & P ever indicate to you or to anyone in your presence how much A & P expected to save in annual

savings or otherwise on private label milk? A. I don't recall any such statement.

Q. Was any such statement ever reported to you by Mr. Tarr or anyone else? A. I vaguely recall some general statement of a substantial amount, but I don't know what it was. I can't recall the circumstance of it, and I think it was from Gordon Tarr, but it wasn't significant enough to me so that it fixed itself in my mind.

Q. Mr. Minkler, at your deposition, at page 287 of the transcript I will just read that, because it is easier? A. Fine.

Q. And I hope by it to refresh your recollection.

> "Q. Did A & P ever indicate how much they expected in annual savings from this arrangement," referring to the private label arrangement.

That was question by Mr. Mathias. And I said to the witness: "Personally." And you said, "Not to me." And Mr. Mathias continued:

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> [367] Mr. Mathias: Your Honor, I object to the statement being read into the record, if the witness cannot identify it.
>
> Judge Hinkes: I don't think we can have anything taken in the record that has not been received in evidence.
>
> This is a document which is totally unidentified.
>
> Mr. McInerney: Well, again, Your Honor, Mr. Mathias did this on a number of occasions.
>
> Judge Hinkes: I am not aware of that. And, if he did, it should have been objected to.
>
> Mr. McInerney: Well, I didn't, in an effort to expedite things.
>
> I will simply describe it as being the first four lines of Commission Exhibit for identification 44-B.

Judge Hinkes: Very well.

Mr. McInerney: Mr. Minkler, any time that you would like a recess, we will be happy to take one.

The Witness: All right. Go right on. Thank you.

By Mr. McInerney:

Q. Now, did you feel that it was necessary for Borden to actually meet any competitive offer A & P might have received? A. I am sure we would have to come close to it. Maybe we had a little leeway.

Q. Isn't it true that in giving your final quotation to A & P with respect to private label, that you felt that you did not actually have to meet any competitor's bid, but come fairly [368] close to it, and that would do it? A. Well, the statement that you are making is kind of contradictory.

Let me have the last part of it.

We have got to come fairly close to it. Maybe we have a little leeway, but we have got to be awfully close to a competitive bid.

Q. Now, why did you think that you could come in somewhat higher? A. Well, I place some value on the many years of excellent service, if you will pardon me, that the A & P had gotten from the Borden Company. They knew we gave them fine in-store attention, and we know they appreciated it.

Q. So that, in making your final offer, you did not believe that you were necessarily meeting the competitive bid, you might have come in somewhat higher, but, however you describe it, somewhat or some little leeway? A. That is the way I describe it; maybe we have got a little leeway, but we have got to come very close to meeting a competitive bid.

Q. And, of course, since it was part of your duties as an executive of Borden to obtain the best price you could from

A & P, if you had any leeway you would like to exercise the leeway; isn't that so? A. Certainly, that is so.

[369] Q. So, is it fair to say that when you did submit this so-called $820,000 bid, you did not actually believe that you were meeting competition precisely, but were perhaps a little bit above the competitive offer? A. Oh, I wouldn't say that.

I mean, by that time that type of thinking was completely out of my head. Save the business; come in with a price they didn't turn down. We hoped we were meeting competition; we hoped we weren't going beyond meeting competition. That's the state of mind I was in when we got to the $820,000.

Q. And you didn't feel that your bid was necessarily meeting the competition; it might have been above it or it might have been below it? A. I think I have already answered—I mean, maybe—I don't know any other way to put it. I felt we had to be very close to the competitive bid. I hoped we weren't going over. We had no way of knowing, but we were now coming in with a price that, well, I mean, we had—we were desperate.

Q. Let me put it this way: If there was going to be any error on one side or the other, which side did you want to be on? A. At that point,—I can't tell you. At that point, I was merely hoping we were meeting competition.

Maybe back there this point that you are making about taking advantage of some leeway because of relationship was [370] more pronounced in the early stages than it was in the latter stages. In the latter stages, we knew that we were in a very dangerous area, we had to get, hold this business.

Q. Well, now, at page 361 of your deposition, Mr. Minkler, starting at line 9, you were asked, "Now, in giving your final quotation to A&P, with respect to this private label business, isn't it true that you felt you did not

actually have to meet any competitive quote, but only come close to it? In other words, that you had a little leeway with respect to the offer that you might make?"

And you answered, "That is the way both Gordon Tarr and I felt."

> Question: "And why was that?"
>
> Answer: "Well, we thought we had a history of a good enough relationship with the A&P customer that they would give us a slight advantage if it wasn't too big." Unquote.

Now, does that help you to recall your state of mind in giving your final quotation to A&P with respect to this private label business? A. I don't—with the exception of some rearrangement of the words, Mr. McInerney, I can't see that I have been saying anything much different from that. I mean, I have already told you that there was some space in here where certainly in the back of your mind you are hoping that you have a little leeway, so you read it back to me just now from—I don't [371] know—two years ago, five years ago, or what the hell it is.

Q. Well, this was in December of 1971, Mr. Minkler. A. Well, I think I remembered that pretty well, then.

Q. Now, are discounts, rebates, and other allowances to customers, generally public knowledge or published in the dairy business? A. A price schedule is; there is a printed price schedule, yes, that is generally circulated in the business.

Q. I am asking about whether, as a matter of general knowledge you would know what your competitors were charging chain store customers, for example. A. No.

Q. Is that kind of information rather difficult to come by? A. Yes, sir.

Testimony of Ralph R. Minkler

Q. And is it, in fact, a rather well-guarded business secret as to what the dairy is offering chain store customers, and, in particular, large chain store customers with respect to allowances, rebates, and so on? A. I believe that is a fair statement; yes, sir.

Q. And do the allowances vary as between customers from the same supplier? A. They might.

Q. Do they not, in fact, vary considerably? A. They might.

• • • • •

[377] Mr. McInerney: Would you please repeat the question that I put to the witness before, Mr. Reporter, and I would like you to please concentrate on the question, sir, and give us an answer to it, if you can.

(The reporter again read the question.)

By Mr. McInerney:

Q. In other words, Mr. Minkler, when you gave that answer that I used the term "any how accounting", did you mean to imply by that that you had said that the $820,000 bid of Borden was based on "any how accounting"? A. I had hoped not, but that isn't the way this read.

The "any how accounting" concept that I had in my mind through this period was that that is what we expected competitors to use.

Q. And, to the best of your resent recollection, did you ever tell anyone from A&P, or was anyone from A&P ever advised in your presence that Borden's quotation was based on "any how accounting"? A. To the best of my recollection, we did not tell them that our bid was based on "any how accounting".

Q. Thank you.

Testimony of Ralph R. Minkler

Now, did you or did anyone in your presence ever tell anyone from A&P that the $820,000 quotation was not cost-justified? A. No; I did not.

[378] Q. In your discussions with A&P people regarding private label, did you or did anyone in your presence ever mention the Robinson-Patman Act to Elmer Schmidt or to anyone at A&P? A. No.

Q. Is it fair to infer, then, that you did not discuss the legal niceties of the various Robinson-Patman Act defenses with anyone from A&P? A. Well, obviously when you say that a quotation is given to you, based upon a belief that we are meeting a competitive bid, you are certainly talking about a part of the Robinson-Patman Act. But you may not use the phrase, and I do not remember ever using the phrase "Robinson-Patman" in any of these discussions.

Q. Now, I believe you have testified that neither you nor anyone at Borden, as far as you know, ever made a formal cost study to determine what the actual cost would be of serving A&P from the Woodstock plant? A. No, sir; we did not.

Q. I think that you also said that you did not tell anybody from A&P that your offer was not cost-justified; is that correct? A. That is right.

Q. I believe also that in testifying yesterday you said that in talking to Elmer Schmidt on the occasion of submitting your final quotation to him, your recollection was that you [379] said to him that, this price is being given to you by us on the feeling and belief that we are meeting a competitive bid; we know of no other way to justify this.

Was that because you did not know, you did not have any cost justification at that point in time? A. No; I wouldn't say it was for that reason.

Q. Well, you did not know that it was not cost-justified? A. I did not know that it was not cost-justified because we hadn't made a cost-justification study.

Q. Thank you.

Now, did you make any sort of an investigation with respect to A&P's, the competitive bid that you understood A&P had? A. None whatever. I wouldn't know how.

Q. Well, has it happened that a customer will tell Borden, from time to time, that he can get his milk cheaper somewhere else? A. I am sure it has.

Q. And do you sometimes reduce your price in order to meet that competition? A. I can't answer that personally, because I haven't. But I have got suspicions.

Q. Well, what I am wondering about, and tell us if you are not qualified or experienced enough to answer it—I mean nothing insiduous by that, Mr. Minkler; please believe me—[380] whether you know, whether it is the general practice at Borden, to reduce prices to a customer on the basis that he says he has been offered a lower price, without verifying what that lower offer was? A. Well, now you said "general practice". This, I can't answer. But I will answer this way: That I am sure that on occasion when a customer has said to Gordon Tarr or to one of our representatives, "Look, I can buy milk from So-and-So, at a better price than I am buying it from you", and he produces evidence to prove it, and our man believes it, he comes in and talks to the sales manager, and there is a hassle on it, and there are, I am sure there are, occasions where the price is met, a record is made, and the price is met.

Q. And when you talked about evidence, did you refer to invoices? A. Oh, yes.

Q. Or the tickets, and that sort of thing? A. Yes; indeed.

Q. Now, did anyone from your knowledge ask A&P to produce any evidence with respect to the competitive bid that you spoke of? A. No one did, to my knowledge.

Q. Either before or after you had submitted the quotation to A&P? A. No one did at that time, to my knowledge.

Testimony of Ralph R. Minkler

[381] Q. Did anyone from Borden, either before or after you submitted this final quotation, ask A&P for a letter or a statement in writing confirming that A&P had received a quotation from a competitor that was at least as low as the Borden offer? A. No; not to my knowledge.

Q. Did you or anyone from Borden at that time or thereafter inquire whether Borden's prices were lower than a competitor's prices or what the relationship might have been between Borden's quote and the competitive quote? A. Inquire of whom, sir?

Q. A&P or anyone else. A. Oh, no. Oh, no.

Q. Did you give any consideration to any course of conduct that would assure Borden that it was meeting but not beating the competitive bid? A. We—

I don't know whether your question is general and covers the whole area here.

All we had, as I have testified before, when I gave the final bid to Elmer Schmidt, he made the remark—well, not the final meeting at the VFW; I am talking about now first—when he first heard of $820,000, he says, "Well, now you are in the ball park", words to the effect that, "This is where you belong"; "This might work out okay for you."

[382] And then subsequently when we did finish this spreading of the 820,000 to the various items out at the VFW, when I said, "You know that we can only give you this price because we feel that we are meeting a competitive bid"; and I said "This is tremendously important, Elmer. You have got to preserve the quotations that you have, whatever they are. You have got to be sure your superiors understand this, and your lawyers understand it. If we are ever asked, we are going to say that we made this bid, this price, based on a belief that we were meeting competition."

And he said, "I read you loud and clear. I understand what you are saying."

Q. Well, I think you have said that already, Mr. Minkler. A. Well.

Testimony of Ralph R. Minkler

Q. My question is whether you gave any consideration to assurances with respect to whether you were meeting or beating a competitive offer, anything in addition to what you have already testified to. A. Well, we certainly sweat over it and talked about it in our shop, but no one knew how we could do it. There isn't any way that you can go to such a customer, or at least we didn't feel we could, and just blatantly say, "Look, show us; if you have got it, why, we will talk", but that wouldn't have served any purpose except to kick us out.

Q. Well, did you consider, for example, writing to A&P along [383] the lines you have just testified to? A. No; no; no.

Q. Did you consider asking them for a letter? A. No.

Q. Confirming that conversation? A. No; no.

Q. One of the documents that Commission counsel have marked for identification is a handwritten document, CX-55-G, that refers to a conversation with a Mr. Greaves and states, in part, "Don't worry about legal aspects until after we hold the business."

> Judge Hinkes: You are referring to what document again, Mr. McInerney?
>
> Mr. McInerney: 55-G.
>
> Judge Hinkes: G?
>
> Mr. McInerney: G; yes, sir.

By Mr. McInerney:

Q. Now, does that help to refresh your recollection at all as to whether any consideration was given to what might be done to assure you that Borden was meeting a competitive situation? A. No; it doesn't, Mr. McInerney.

> Mr. White: Your Honor, I move to strike the question insofar as it brings into the record information from a document that is not in evidence.

Testimony of Ralph R. Minkler

Mr. McInerney: The document that the Commission [384] to introduce in evidence, and by the time it does, Your Honor, this witness may not be available, and I think—

Mr. White: I have no objection to showing it to him and asking him, but it is the same problem we had before as to whether the record is going to contain items—

Judge Hinkes: Yes; to refresh his recollection, he should be shown the document, and the record should not contain any items from a document not received in evidence.

Mr. McInerney: Well, Your Honor, when and if it is eventually received in evidence, I wouldn't be able to, unless we recall Mr. Minkler, and I don't want to do—

Judge Hinkes: Well, you simply ask the witness to take a look at the document and know where in the record it is. That is what should have been done, but the damage has already been done, so we will have to go on.

By Mr. McInerney:

Q. Who is Mr. Greaves, Mr. Minkler? A. He is the Borden attorney, the company attorney in the Chicago office.

He was. He is now retired.

Q. Did you receive advice from him with respect to this matter in early September or late August of 1965? A. I don't specifically remember. I know that there were occasions when I would talk to him.

Q. Well, prior to the submission of the final quotation to [385] A&P, were there such occasions? A. I am sure there were.

Q. And you discussed this matter with them prior to that time? A. Yes; I did.

Q. Now, I believe you have already told us that neither you nor anyone in your presence ever told A&P or anybody from A&P, rather, that the private label prices offered to A&P would not be made available to other purchasers; is that correct? A. That is correct.

Q. Now, would Borden, in fact, have sold private label milk to another customer, for example, Kroger, on the same terms and conditions that it offered private label milk to A&P? A. I believe we would; yes, sir.

Q. And, subsequent to this offer to A&P, did you, in fact, or did Borden, in fact, make private label offers to other customers? A. Not to my own personal knowledge.

Q. Would you have known if such offers had been made? A. Not noticeably.

Q. Now, at the time of your meeting with Mr. Elmer Schmidt, in September of '65, when you submitted this final quotation to A&P, did he ask you to verify in writing that these prices [386] would be made available to other customers of the same size? A. Not to my recollection; no, sir.

Q. Well, I would like to show you a portion of a copy of what has been marked as Commissioner Exhibit 63-C for identification, and I am showing the witness the fourth paragraph down, the middle of the paragraph.

I don't want to do any more than give you the first two words, so that everybody will know where we are talking about. It starts, "Letter indicate customers of same size", and would you read that sentence? A. Letter indicate—

Q. No; I'm sorry. I don't think anybody wants you to read aloud at this point. A. Oh, pardon.

Q. I would be happy for you to, but I think there might be some objection. A. All right.

I read it.

Q. Now, does that help to jog your memory with respect to any request of that nature from Mr. Schmidt or from A&P? A. No; it does not.

Testimony of Ralph R. Minkler

Q. Have you had occasion to see that kind of a letter passing between Borden and A&P at any time? A. I don't recall.

Q. I would like to show you something that has been marked [387] Commission Exhibit 68-A for identification, and ask you what that is, sir. A. It is a letter from Gordon Tarr to Elmer Schmidt of the A&P Tea Company.

Q. Do you recognize the signature? A. Yes; I do.

Mr. McInerney: I offer that in evidence.

Mr. Mathias: As whose exhibit, Your Honor?

Judge Hinkes: As presumably Respondent A&P Exhibit Number 2.

It has been marked for identification as a Commission Exhibit, but, of course, it isn't being offered by the Commission.

It will therefore have to be re-marked as Respondent's Exhibit A&P-2, identified as a letter from Mr. Tarr to Mr. Schmidt, and dated October 1, 1965.

(The document referred to, previously marked as a Commission exhibit, was re-marked as Respondent's Exhibit A&P-2 for identification.)

Mr. Mathias: Your Honor, I do have an objection. This witness has not been able to identify the exhibit. I do not believe there has been any ground work laid for its introduction into evidence.

Mr. McInerney: Your Honor, I think he has identified it. Mr. Mathias, himself, had it marked for identification [388] and I see no basis at all for the objection.

Mr. Mathias: Your Honor, marking is a far cry from introducing it.

Judge Hinkes: Well, the difficulty is this is a letter which has been identified as containing the sig-

nature of the sender, Mr. Tarr, but whether it was ever sent, let alone received by the addressed, we don't know, and its probative value would be nil if it was never sent.

Mr. McInerney: I would like Mr. Mathias to tell Your Honor whether he was questioning whether this was ever sent.

Mr. Mathias: Your Honor, it is not up to me to know whether it was ever sent. If Mr. McInerney is asking me to stipulate it into the record at this time, that is a different question.

Mr. McInerney: Well, what about that?

Mr. Mathias: And I refuse.

But the question is whether or not it has been properly identified.

Mr. McInerney: I think, Your Honor, we are taking a lot of time on—

Judge Hinkes: Well, in any event, I have to sustain the objection unless counsel are willing to stipulate its admission. Obviously, this document has not been identified as a document of any probative value inasmuch as it might [389] have been simply retained by Mr. Tarr and had never seen the light of day.

Mr. McInerney: I must except to Your Honor's ruling, but I am even more amazed that counsel for the Commission takes this position.

I will ask the reporter to mark what is presently marked A&P Exhibit 3-A and please mark that as A&P Exhibit, I believe it will be, 3, at this hearing.

(The document referred to was marked Respondent A&P Exhibit 3 for identification.)

Mr. McInerney: I would like to note for the record that what is now marked A&P Exhibit 2 for identifi-

cation and A&P Exhibit 3 for identification were both used at the deposition of this witness previously, and Commission counsel is well aware of them and their authenticity.

Judge Hinkes: Well, be that as it may, I think your complaint is to Commission counsel and there is nothing I can do about it.

Mr. McInerney: The problem is, Your Honor, I have been trying not to take up too much of Mr. Minkler's time; I have been doing my best to expedite his examination.

Judge Hinkes: I understand.

May I see your Exhibit 3, please?

Mr. McInerney: Yes, sir.

Mr. Mathias: Could we see Exhibit 3, please?

[390] Mr. McInerney: It is the document that was marked as our Exhibit 3-A at Mr. Minkler's deposition, of which you have a copy.

Mr. Stone: Could we see a copy of it to compare them? I don't think we have a copy.

Judge Hinkes: Show it to them.

Mr. McInerney: I think you are familiar.

Judge Hinkes: Now, this last exhibit, Mr. McInerney, is a letter apparently signed by the witness. Perhaps you can establish its authenticity sufficiently here and now; I don't know.

Mr. McInerney: That is exactly what I was going to do, Your Honor.

By Mr. McInerney:

Q. Showing you now what has been marked Respondent A & P Exhibit 3, would you tell us what that is? A. A copy of a short letter from me to Jack Pentz.

Judge Hinkes: Dated?

The Witness: Dated October 1, 1965, signed by me.

By Mr. McInerney:

Q. And does Respondent A & P Exhibit 2—is that the enclosure to Respondent A & P Exhibit 3? A. It would certainly appear to be; yes.

Mr. McInerney: I offer those both in evidence, Your Honor.

[391] Judge Hinkes: Did you send these letters to Mr. Pentz, Mr. Minkler?

The Witness: Well, I don't recall either of them at all. And, I'm sorry, but I do not. I have no recollection of them. But that's certainly my signature; I concede that.

Mr. Mathias: Your Honor, I see no basis for the introduction of Respondent A & P Exhibit 2, through their Exhibit 3-A. 3-A just states, here is a copy of the letter delivered to A & P this morning. It makes no description of the letter. The witness states no present recollection of the letter.

Judge Hinkes: No; the witness said it was.

Mr. Mathias: Of the letter, but not of the attached letter, the so-called attachment letter, A & P Exhibit 2. The witness has stated he has no recollection of the document, and the only thing he has identified is his signature on the letter to Mr. Pentz, A & P Exhibit 3.

Judge Hinkes: Mr. Minkler, do you remember signing this letter?

The Witness: No, sir.

Judge Hinkes: Do you remember it being prepared by anybody?

The Witness: No, sir.

Testimony of Ralph R. Minkler

Mr. McInerney: Your Honor, I don't think the test is whether he has a present recollection of signing the [392] document. I never imposed that test on anything that Mr. Mathias tried to offer in evidence.

Judge Hinkes: No; I wasn't testing his recollection of signing it as much as trying to ascertain that such a letter actually originated and went out; that is all.

Mr. McInerney: Your Honor, when this case is over, there will be no doubt about the bona fides and authenticity of that document. I am awfully amazed at this problem.

Mr. Mathias: Your Honor, a number of points have been called to my attention here.

I was not familiar with the one letter or the source, and we have discovered some of these letters. It appears that the letter of October 1st, 1965, addressed to E. R. Schmidt and G. Tarr for G. Tarr's signature was mailed to Mr. Pentz on October 1, 1965.

We have copies of Borden file letters. We would not contest that A & P received a copy of the October—of the E. R. Schmidt letter, that is, Respondent A & P Exhibit 2.

Judge Hinkes: In which case?

Mr. Mathias: I do object to the form in which it is attempted to be introduced through a witness who has absolutely no knowledge concerning the document and has answered on several occasions that he does not. But we will stipulate that the document was received by A & P.

Judge Hinkes: Well, under the circumstances, I [393] shall receive these two exhibits of the Respondent A & P in evidence.

Testimony of Ralph R. Minkler

(The documents referred to, heretofore marked for identification as Respondent A & P Exhibits 2 and 3, were received in evidence.)

Mr. White: Your Honor, just as a matter of clarification, I assume that I should inquire as to what counts it is being received with respect to.

Judge Hinkes: Mr. McInerney.

Mr. McInerney: Well, I am not pressing any count against Borden at this time, Your Honor, in this forum. I think it goes to A & P's good faith on all three counts, as far as I am concerned. I am introducing it in defense of A & P.

Judge Hinkes: I think that is a sufficient answer for the purpose.

A & P is not a charging party in this case, and its only interest, legitimate interest, would be in defending charges against it. And, for that purpose, of course, it is being received, but having been received it is available for any purpose in this proceeding.

* * * * *

[398] * * *

The second letter, Respondent A & P Exhibit 3, is signed by you and it is addressed to Mr. Jack B. Pentz, President, Borden's Milk and Ice Cream Company, Division of the Borden Company, New York:

"Dear Jack:

"Here is a copy of the letter delivered to the A & P this morning.

"Cordially,

"Ralph."

Now, do you have any recollection with respect to that letter? A. I am going to tell you. All of this could have been put together by Joe Malone. You denied me the opportunity to say that, but—

Q. I didn't deny you the opportunity. A. Well, I felt you did.

I can't recall these letters, but it wasn't an absolute impossibility at all, because it happened from time to time that Joe would write a letter and bring it to me to sign and it would go across my desk that quick.

Q. Thank you.

Do you recall anything else about these letters? A. No; I do not.

Q. Is there any way that we might refresh your recollection?

[399] Can you think of anything that might help you to recall how these letters came into being? A. Well, I am very sorry; I wish I remembered these letters, but I don't.

Q. Well, letters of this nature, presumably from what you have said before, they would have been discussed among you and Mr. Malone and Mr. Tarr; is that correct? A. Well, certainly. We certainly discussed all the development of our prices together; yes. So,—

Q. Well, now, is there anyone else that you might have discussed a letter, such as either one of these, with? A. Joe Malone might have discussed that one letter with Joseph Greaves.

Q. He is the attorney? A. He is the attorney; yes, sir.

Q. Do you know whether he did or not? A. I do not; I do not.

Mr. McInerney: May we have a short recess?
Judge Hinkes: Yes.
Off the record.

(Discussion off the record.)

Testimony of Ralph R. Minkler

(A brief recess was taken.)

* * * * *

[403] * * *

By Mr. McInerney:

Q. And do you know whether he had any experience as a milk buyer prior to these private label negotiations? A. Well, he was buyer before the private label, buyer for milk right in Chicago, before the private label discussions began. I don't know how long he was, but—

Q. Do you know whether he had ever had any negotiations for private label milk, for example? A. No, I do not. No, I don't.

Q. You don't know whether he did or he didn't? A. That is correct.

Q. Now, during the course of your deposition in 1971, toward the end of the year, December, at page 365 of the transcript, you were asked the question:

> "Now, in 1965, was Mr. Schmidt also a knowledgeable and sophisticated buyer of milk and dairy products, in your opinion?"
>
> Answer: "Not particularly."
>
> Question: "Had he had much experience in this area?"
>
> [404] Answer: "No, he was rather new in that area." Unquote.

Now, appreciating that your memory may have been better then than it is today— A. Well, that is not too inconsistent with what I have said, is it?

Q. Well, I am not arguing with you, Mr. Minkler. I am just trying to get at what the facts are. A. Oh, excuse me.

Q. Does that help to jar your memory at all as to what knowledge and sophistication Mr. Schmidt had in 1965, in

the area of purchasing milk? A. Beyond what I have already said, I am getting a little lost. Certainly by 1965 he knew, he was beginning to get pretty sophisticated, I would think, by the time we got to the end of the bidding on private label business. And as I have already said, that in an earlier period of time I think that Gordon Tarr did a lot to establish his friendship over there by helping, I guess educate is the word, Elmer, into some of the complications of the milk business.

Q. Do you know if Elmer had any other tutors? A. No, I do not.

Q. Mr. Minkler, you have testified with respect to these negotiations on two prior occasions, as I recall. One is the deposition that we have been referring to, which was on December 1st or 2nd, of 1971, and the other occasion was in * * *

* * * * *

Testimony of Gordon Tarr

June 19-20, 1973

[842] • • •

J. Gordon Tarr was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Judge Hinkes: Would you state your full name, please?

The Witness: James Gordon Tarr.

Direct Examination by Mr. Mathias:

Q. Tarr is spelled? A. T-a-r-r-.

Q. What is your present address, Mr. Tarr? A. 59 West Burton Place, Chicago, Illinois.

Q. Are you appearing today in response to a Commission subpoena, sir? A. That is right.

Q. What is your age, sir? A. 72.

Q. Are you presently employed, sir? A. No, I am retired.

Q. In what year did you retire, sir? A. 1968, September 1.

Q. With whom were you employed immediately prior to your retirement? A. The Borden Company, Inc., now.

• • • • •

[851] It was what we called area No. 1. It comprised 70 percent of all the business that we did with A & P, all the milk business that we did with A & P.

Q. Would the Calumet area include Gary, Hammond, East Chicago? A. That is right. That was all part of that Federal Marketing Order.

Q. Did you assist in the preparation of the price quotation that was made to A & P in February? A. I did not.

Q. But you did deliver it to A & P? A. That is correct.

Q. Who was present when you delivered it? A. So far as I know, just Mr. Schmidt.

Q. Did anyone else accompany you from the Borden Company? A. I don't think so.

> Mr. Mathias: Your Honor, I want to show the witness an exhibit in evidence. We do not have all of the exhibits back yet from the marking procedure. I do have a copy of CX-14-A-E. I wonder if Respondents have any objection to my showing him a copy of this exhibit.
>
> Mr. McInerney: No.
>
> Mr. White: No.

By Mr. Mathias:

Q. Mr. Tarr, I show you a document which has been received [852] into evidence as Commission Exhibit 14-A through E, which is dated February 9, 1965, and ask you to briefly review this document. A. This document is the one to which I just had reference.

Q. This is the document you delivered to Mr. Schmidt? A. This is the document I delivered on or about February 9 to Mr. Schmidt, and as you will see, it was for the Chicago and suburban areas.

Q. What did Mr. Schmidt have to say about the February 9 offer? A. At that time, he accepted the whole thing as okay.

Q. Prior to going to see Mr. Schmidt with the February 9 offer, did you hold any internal discussions with Borden management concerning the approach that you were to take with Mr. Schmidt? A. Not that I can remember.

Q. Was there any reason, Mr. Tarr, why this February 9 offer was limited to the Chicago-Calumet area, or Area 1, as you referred to it? A. There were many reasons. One of the principal reasons was when you got the outside area, the other 30 percent was divided up under many different orders. It had prices that were, generally speaking, lower than anything we had in Chicago way. It would

be quite difficult, as I explained to Mr. Schmidt, and was when we went into it, and finally arrived at it, it was * * *

* * * * *

[863] * * *

Q. Is there anything else at all that you can recall about this particular meeting, that is, the one in which Malone accompanied you in 1965? A. No, so far as I know, that was about it.

Q. Following this meeting, did you and Mr. Malone report to Borden management? A. I think Mr. Malone did.

Q. Were there any internal conferences or discussions concerning the status of the private A & P label matter? A. I wouldn't know if there were discussions or not with the Board of Directors, but so far as I can remember, I don't remember anything, particularly over at our place where it was discussed.

Q. From February to late 1965, did you have frequent meetings with Mr. Minkler, Mr. Malone and others, in management group concerning the private A & P label business? A. No, not unless something was changed. That was the only time I was brought in.

Q. What was the effect, that you can recall, in connection with the Borden-A & P negotiations following this May 1965 meeting? [864] A. I know in the latter part of July, I went over there with a quote that included on outside points, a differential in cost, different costs, and a different uniform cost based on their deliveries which would apply to the private label.

Of course what might have happened was that prior to that, Mr. Schmidt asked me about it. I don't recall exactly how it came up.

Q. Would this be in area No. 1? A. No, because with this solid union, they had here, it would be impossible to make break, but on the outside, we gave them quote we would move toward these things as rapidly as we could.

You couldn't do it in Rockford, but you could do it in the outer suburban area.

You coud do it in Ottawa, La Salle, and many places. So some places, you could not go further than five days, but we were working down toward three all the time. Somewhat would have the ultimate which was three days, so it was not the amount of saving, but a stepping stone from five to four to three, so that one man could cover two existing routes on that basis.

Q. What relation did this have to July, 1965 offer? A. That is what the offer was. The offer was a pricing on private level, a quote, we were still not dealing them any, we did have it existing at that time in an area where we do even put it in on the Borden label. Mr. Schmidt, he wanted that much off, which was a saving and justifiably so, on the [865] three different days.

Q. Who prepared the offer in the delivery of late 1965, did you assist in the preparation of it? A. I developed it. It was my job to develop the differential in the three, four, five days. I don't know if Mr. Malone did or I did, but I am quite sure I had a hand in it.

Q. Mr. Tarr, how was this quotation in late July—first, was it delivered to A & P? A. Yes.

Q. Do you recall who you delivered it to, sir? A. Mr. Schmidt.

Q. This is the same Elmer Schmidt we have been discussing all the time? A. That is right. He was the head buyer of dairy product for A & P.

Q. Did you ever have any dealings with anyone at A & P, other than Elmer Schmidt? A. If Elmer was not there, I would see Bob Hall. This was not on big questions. Hall was Elmer's assistant and I would talk to Bob at times.

Q. Did you ever have any dealings with Mr. Schmidt's superior? A. Do you mean the Divisional Man, Bartels, for instance?

* * * * *

Testimony of Gordon Tarr

[871] *By Mr. Mathias:*

Q. I would like to show you Commission Exhibit 37 A and ask you if this document refreshes your memory as to the amount of savings stated to Mr. Schmidt at this August 13 meeting? A. This is exactly what I mean when I said I was not quite sure it was up to the 410 or was in the 300-something. It was before that that it was 300-something. This was in writing.

Q. Is your mind now refreshed as to the amount of savings in August? A. Yes, 410.

Q. On August 13, the amount calculated was $410,000 and some for savings for Mr. Schmidt? A. That is correct.

Q. Do you recall anything else concerning the discussion between you and Mr. Schmidt at this August 13 meeting? A. Not offhand I can't remember anything.

Q. What occurred next in your dealings with A & P? A. I think about a week after that I was over to A & P and we talked about various things. Elmer said, "By the way, we have asked for bids from other dairies just to make sure you are right in this thing, and we felt it was better to get outside bids to make sure everything was correct on your costs and so on."

Q. What did you say to Mr. Schmidt at this point, sir? A. In the first place, I was surprised because I understood [872] and was told it was not going to be put out for competitive bids because then everybody would know about A & P going into private label, and I did not think anybody would bid lower than we bid anyway. I was quite disappointed and a little shocked that he had asked for bids and I told him so.

Q. What else did you say to Mr. Schmidt? A. I can't remember, but it was along that line.

Q. Did you mention any fear concerning the results of requesting competitive bids? A. I don't know at that time. I know at other times I had told Elmer some people would like to get this business pretty badly and they might bid under any reasonable figure to get it hoping they would be able to make it up later since it was a new business for them and it was the entire business for us. I don't know if that was the particular time but that was mentioned in the course of things.

Q. Did Mr. Schmidt indicate what other dairies had been contacted for bids? A. Not in so many words. He did mention some names along in the course of things, but he did not actually say these are the ones that were asked for bids or anything, but he did mention the names of a couple of dairies.

Q. What dairies were named? A. He mentioned Bowman's.

Q. When you did mention your fear to Mr. Schmidt concerning [873] the possibilities that other dairies would underbid Borden at an unreasonable price just to obtain the business, what did Mr. Schmidt say to you? A. It seems to me he said something like, "We understand these things and we would recognize if someone came in with something like that—we would certainly recognize it as such. You don't have to worry about anything like that. If anybody comes in with anything that is crazy, we would know it."

Q. Was there any other discussion at this meeting in which he mentioned that the matter was to be put out for bid? A. I can't recall anything else.

Q. Who was present at that meeting? A. I am quite sure it was just Mr. Schmidt and myself.

Q. What occurred next in your negotiations with A & P? A. I may not have these things in proper sequence, but I

will try to develop them along that way. It seemed to me around September 1—I know this happened—that Elmer called me on the telephone on a late afternoon—I don't remember what day of the week it was—he was very agitated. He said, "I have a bid in my pocket. You people are so far out of line it is not even funny. You are not even in the ball park." This was on the telephone. He was on his way home at the time he called me. He said, "This is really terrible. I am shocked at the big Borden Company and the relationship we have. I have a bid right here in my pocket."

[874] He said, "This bid is so far different from yours that there isn't any comparison."

He said, "Suppose you see me the first thing in the morning."

I said, "I will be glad to."

I went over to A & P the next morning. In fact I told my people what he said immediately. The next morning I went over to see Elmer and he said, "Look, this is terrible. I don't understand it at all. You are nowhere near in the thing."

I said, "You know all the things we do for you. We have promotions, and this and that and we have manpower out in the field. I told you there would be some bids that might come in that might be screwy, and I don't see how anybody can sell any cheaper than us. I can't figure the deal out, but certainly they can't be doing what we are doing."

He said, "If the promotions you are giving us are costing $50,000 that would not be a drop in the pocket between your bid and the other man's bid."

I said I couldn't understand and I told him I would go back and talk to my people, which I did.

Q. How long was this discussion in Mr. Schmidt's office. Were you in his office for a long time? A. I don't think

it was a long time. It was not like the time Joe Malone was there. It was brief and to the point.

Q. Did you attempt to obtain any information as to the [875] character of the competitive offer Mr. Schmidt had? A. There was no sense in that because he said he couldn't tell me what it was, and I knew he couldn't and wouldn't. Always in a case like that I would try to feel around a little bit and I think I did in this instance. I don't remember what I said or what I asked, but I did feel around a little bit.

Q. Did you keep the conversation going for a while? A. A little bit, I guess. In the course of it he said he couldn't tell me and I told him I was not asking him who. I was just trying to get some idea because I couldn't understand it anyway. The only thing I got for a suggestion was $50,000 would not amount to anything, that it would be a puffer compared to the total amount. That is all I knew for that particular time.

Q. Was there any mention as to whether or not there was one bid or more than one bid? A. At that time he said "A bid in my pocket."

Q. Was there any indication as to who the competitive bidder was? A. No. There wasn't anything said as to who it was. I don't think I tried to find that out. I tried to see if I could get some basis of figuring the thing out. That is all.

Q. What happened next? Did you go back and report this to your management? A. Immediately.

[876] Q. This is to the management of Borden? A. Yes.

Q. And that would include Mr. Minkler and Mr. Malone? A. That is right.

Q. What occurred next? A. I guess they went to work on trying to see what they could work out of this thing without anything like manpower and product guarantees

and any of these kinds of things. All the guarantee then would be that milk would be in good shape when it was delivered. After that, it was their property and all the things we could possibly make any savings on, but I did not work these things out.

Q. You did not participate? A. I did not participate. I believe Joe Malone and others did.

Q. Did you participate in any of the conferences leading to a new quotation? A. Only when they arrived at what they thought they were going to do, and prior to the time when I came back from A & P and mentioned it, I think they called a special meeting and I had attended that.

Q. Did Borden then prepare a new offer? A. They did.

Q. What happened next? A. I think it was about a week later I made an appointment for [877] Mr. Minkler and myself to meet with Elmer Schmidt. When I went over there Elmer reiterated all the conversation almost verbatim that he had with me, that it wasn't even in the ball park, and how shocked and surprised he was at our company trying to go along with such a low bid when someone else was bidding high, and all the whole thing.

At that meeting Mr. Minkler had prepared a statement on the amount but it had not actually been divided up by products or how we were going to do it, but this was calculated on what Mr. Minkler called anyhow accounting.

Q. What was that? A. It was a new type of term that described a company feeling this was extra business for them and, therefore, they would not put any overhead on to the product, hoping that perhaps later they could and would go the limit that they could possibly go on "anyhow accounting"—in other words, eliminating the normal procedure in accounting of charging overhead and all these other things to the product. We came up with a figure just double what this $410 was—$820,000. This would eliminate all services, all manpower, all these things that

we were doing. It would be a drop delivery. The drivers would not put the product away. They would not put it at the dairy. They would leave it at either the back door or at the back of the cooler, and there would an advanced order system that would go into effect so we would know what to prepare for A & P for [878] the next day and the orders could not be changed until the next afternoon and all overhead was eliminated, too, I believe in the calculations. This was what he called anyhow accounting—anyhow they wanted it.

Q. In the discussion between Mr. Minkler and Mr. Schmidt, what did Mr. Minkler say about this $820,000 figure? A. He described it as "anyhow accounting". He said, "You know, we are pioneering this, and we pioneered this three, four, five day thing, and we have tried to do everything to get dairy prices down lower for you and everybody in the business." He said we had been doing things for him that we could not continue to do and we could only guarantee that it is a good product, in good saleable condition, and beyond that it is your product.

Q. So Mr. Minkler did mention the term anyhow accounting to Mr. Schmidt? A. Yes, he described it entirely to him and to me too.

Q. What did Mr. Schmidt have to say concerning this new quotation? A. He said, "Now you are in the ball park."

Q. Was anything more said between Mr. Minkler and Mr. Schmidt at this meeting? A. He said, "Please give me in writing all these things you cannot do now which you did."

Q. What about the individual product prices? [879] A. We would have to work this out and we would get back to him with the prices.

Q. At this meeting, this $820,000 saving was the entire quotation, is that correct? A. That is right. Was a quote that the differential would come out to $820,000.

Q. Then this had to be spread throughout the product line? A. That is correct.

Q. Was Mr. Schmidt aware of this fact? A. Yes.

Q. Did he make any statements concerning the spread of the price to the product line? A. He said we were in the ball park.

Mr. McInerney: I object.

Judge Hinkes: Strike the answer.

Rephrase your question.

By Mr. Mathias:

Q. What else was discussed by Mr. Minkler and Mr. Schmidt at this conference? A. There were quite a few things talked about. Offhand, I can't remember just what any of the other things were. These were the important things in relation to the quotes.

Mr. McInerney: I would like to move to strike the question and answer which had to do with whether Mr. Schmidt was aware of something. As far as I recall, there was no [880] basis for that in testimony as to what was said and done. In any event I think it was an improper question.

Mr. Mathias: Your Honor, this witness was present at the meeting. The prior question to that had elicited the information that at this point the quotation or offer by Borden was strictly for an $820,000 saving figure and that this had not been spread through the product line. I merely asked the witness if Mr. Schmidt was aware of this fact.

Judge Hinkes: The witness answered Mr. Schmidt was aware, but can you tell me how do you know Mr. Schmidt was aware?

The Witness: He had been told it was the amount, and we had not developed it. We will develop it.

Testimony of Gordon Tarr

By Mr. Mathias:

Q. What occurred next, following this meeting of early September, 1965? What was the next development in the dealings between Borden and A & P? A. I think the next thing was Elmer told me he was going to take a vacation just a couple of days afterwards. His wife was going to have a baby and he was going to take his vacation at that time. He was not going to leave Libertyville and anything we had to report we could call him up at our house and he would direct what we would do with it. He said, "Get busy with this breakdown because we are losing money every day until you come up with this quote. We want to buy private [881] label and Borden possibly rather than straight Borden."

Q. Did Borden compute out an offer spreading this $820,000 to the product line? A. Yes, but there was something else in between that.

Q. What was that, sir? A. Elmer Schmidt had always wanted to have glass gallons in the private label line. We felt it was rather impossible in our operation to put a private label gallon jug which would have to be sorted out, come back to us and sorted out and kept separate and operate the thing correctly with the number of A & P bottles as well as ours. It would be an awful mess. We felt it would be impossible to work the thing under the present situation.

However, during all that time there were some thoughts being given to it. Production was being asked about it and others. It was finally decided that we could put out a gallon glass with an unlabeled bottle having an insignia on the bottom. It would not say Borden, but an insignia so we would know it is our bottle and take it back and have one cap for Borden's and put everything on the cap, and another cap for the A & P and still use the same bottles, and this could work out maybe, and we could develop something like that.

Q. Why would Borden want to include the bottles in their quotation?

Mr. White: I object to the form of the question. There is no basis for that.

[882] The Witness: Elmer wanted it.

By Mr. Mathias:

Q. Was there any advantage to Borden to include the glass? A. Elmer thought there was afterwards, but we did not think it that way. We thought Elmer wanted it that way and we were developing an overall plan for the $820,000.

So, anyway, shortly after Elmer had gone on vacation, I called Elmer and asked him what he thought about having glass gallons included in the quote and he felt—his first reaction to this was it should be glass private label, and I felt we could work it out on the basis of a plain glass gallon that would have the difference on the cap between Borden and A & P. Elmer thought that was a good idea. He said no private label program could be complete without having glass gallons. It had been what he had been talking about for a long, long time, so he thought that was fine at that point.

Q. How did the price on the glass gallons compare with paper gallons? A. Cheaper, at least with Borden.

Q. Why was that? A. Because glass has maybe 25 times use and while it costs somewhat more than paper, the paper gallon costs more than two half-gallon paper cartons so, you see, there is no saving in paper gallons actually. It is something stores sell less. There is even a little greater cost for the dairies. So, if [883] we are trying to get something that is cheap, paper gallons could not compare with glass gallons.

Q. Were the glass gallon jugs included then in a quotation to the A & P? A. They were.

Q. Was this quotation delivered to A & P? A. Yes, it was delivered to Bob Hall. I called Elmer and told him we had the quotation all ready. We found out about the glass gallons then and the glass gallons was in the quotation. I talked to Elmer and he said give it to Bob Hall, which we did. Mr. Minkler went over with me and we delivered it to Bob Hall who asked a few questions but nothing of any import and nothing that I can remember exactly. He asked questions about different things and accepted the quote.

Q. Was anyone present at this meeting besides you and Mr. Minkler and Bob Hall? A. No. We went to a private office there.

Q. Was there any discussion at this meeting that you can recall? A. Nothing, except I said there was nothing important. I can't remember anything that was said actually but there wasn't anything important.

Q. What occurred next following this meeting with Mr. Hall? A. Elmer got on the phone and he was very excited again. He said, "You are pulling a fast one here. You are putting [884] glass gallons in here as part of the $820,000."

I said to Elmer, "I checked this with you and it was part of the program."

He said, "It is not fair to the other bidders." He said, "They were given figures on all these items and they did not bid on glass gallons."

I said, "I thought you want it, but if you don't want it we will take it out and figure it just on these other things. I thought you wanted glass gallons and that you were after a certain figure."

So that is what we did.

Q. Was this in a telephone call that Mr. Schmidt gave you this information? A. There was one time and this may have been it when he came down from Libertyville and met with us or met with me—I can't remember.

Q. But you were involved in this communication from Mr. Schmidt? A. Yes, it was a telephone call to me. I know on one occasion he came down from Libertyville, and I don't recall if this was the time or not.

Q. What occurred after this communication from Mr. Schmidt? A. We changed the quote and left out the paper gallons and developed the things along the lines—

Q. You stated paper gallons, did you mean the glass gallons? [885] A. Yes, we left the glass gallons out and then sometime right about that time Elmer said to me, "Look, sharpen your pencil a little bit because you are not quite there," meaning what the other party was bidding, I guess. So, as we developed the new one I think it came out a little higher because we found some products we could give a little better deal on and we did.

Q. Was this next quotation delivered to A & P? A. That was the final quotation and it was delivered to Elmer —by that time his wife was in the hospital and the baby was not born yet and he did not dare leave town, but he wanted to see us and see the whole thing. I guess he was some officer in the Veterans of Foreign Wars up there in Libertyville, so he opened up the club for the three of us and we sat there and discussed the whole thing in great length.

Q. Who was present at this meeting? A. Mr. Minkler, Mr. Elmer Schmidt, and Mr. Tarr.

Q. What was said at this meeting by Mr. Minkler? A. He explained the whole thing to Elmer. He explained how the thing worked. It was a very smooth quote in that you could take any area and take the marketing price, and you could compare that with the marketing price of another area and the different price and you would find that the differential was exactly what that difference in cost was. If the first market went up to the second market, it would be still as the second [886] market, if the paying price

went up. This was a beautifully worked out thing that was foolproof. Here was the whole thing and just what he asked for and he liked it.

Q. What did Mr. Minkler say to Mr. Schmidt, if anything, at this meeting? A. He said many things. We talked about many things there but I can't remember all the things that were talked about, but I can remember the end of it.

Q. What was that, sir? A. At the last of it Mr. Minkler said, and I can't give you his exact words, but in effect he said, "Now, Elmer, look, we have met a competitive situation here on this bid, on this quote. You know that. This is right, isn't it", and Elmer said, "Yes."

He said, "Now, I want you to be sure to save the bids in a safe place."

He said, "They are being saved, and I know what you mean. The Legal Department has them at the moment and the Legal Department will probably keep them."

He said, "I understand you, I read you loud and clear", or something like that.

He said, "I think this quote will be very acceptable to our people. I don't think there is any reason to presume that you won't be serving us very shortly with the account."

* * * * *

[894] * * *

did Borden begin to sell private label milk and dairy products to A & P in the Chicago area under the terms of the quotation delivered to A & P in late September in Libertyville? A. No, not in late September.

Q. I will strike the question.

You have referred to the quotation delivered in Libertyville as your final quotation to A & P, is that correct, sir? A. That is correct.

Q. Subsequent to this time did Borden begin to sell

private label product to A & P under the terms of this quotation in the Chicago market area? A. Subsequently, yes, at about November 1, which is subsequent I guess.

Q. So sales of the private label to A & P began on or about November 1? A. Yes.

Q. That is 1965, sir? A. 1965 still.

Mr. Mathias: Your Honor, I think we are at a good breaking point. I don't think we have much more examination of this witness in the morning. It might be a good idea—I would like to shorten the day tomorrow as much as possible for Mr. Tarr and possibly we could start at 9:30.

Mr. White: It is all right with me.

* * * * *

[910] * * *

Q. Were you familiar with those records, the form sheet? A. To some extent, yes. I didn't use them.

Q. I hand you Commission Exhibit 121 for identification and ask you if you can identify this document, sir? A. Yes, sir.

Q. And what is this document, sir? A. This is, as I just mentioned, the type of price sheet that was given out to every customer outside of the chains.

Mr. Mathias: Move CX-121 into evidence.

(The document referred to, heretofore marked for identification Commission's Exhibit 121, was received in evidence.)

Mr. McInerney: Your Honor, this is a document that was never sent to A&P according to the witness' testimony and I am not sure. I don't think it is relevant to anything here.

The Witness: It was a list price.

Mr. Mathias: Your Honor, this was a published list price, as the witness stated, that was sent to their other customers and shows part of the basis for pricing to other customers. In this instance the sheet identifies itself as the Hammond areas, which is one of the areas in consideration in our complaint.

[911] Mr. McInerney: I think it is clear and if it isn't, I would like to ask the witness a question on voir dire.

Judge Hinkes: You may do so.

Voir Dire by Mr. McInerney:

Q. Mr. Tarr, did you ever give a document similar to this one to A&P? A. No.

Q. And is it fair to infer that you never gave this document to A&P? A. No. As far as I know, I didn't.

Q. Well, can you tell us looking at the document that you have in front of you whether you ever gave that document to A&P? A. As far as I know, I never did.

Q. Well, this apparently has to do with the Hammond region if you have anything to do with the Hammond region? A. Yes, it was part of the Chicago operation, our Chicago branch operation.

Q. Insofar as that region was involved with chains to whom you were selling, is that correct? A. Well, this was given not to chains. It was given to other eastern chains. There was a discount schedule attached to that you see.

Mr. McInerney: Thank you.

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[935] • • •

Q. Now, once Borden commenced supplying private label milk products to A & P did that include service to any

A & P stores in the State of Iowa? A. No, sir. We never sold private label in Iowa.

Q. Yesterday you discussed an occurrence where you delivered a price quotation to Mr. Bob Hall of A & P. Do you recall this? A. Yes, sir.

Q. And I think, Mr. Tarr, you said that Mr. Hall accepted the quote. Did you mean that he merely received it or this he told you that it was acceptable? A. No, he merely received it. I used the wrong terminology.

Q. Mr. Tarr, at any time during the private label negotiations about which you have testified or subsequent thereto, did you discuss with any representative of A & P or did anyone else discuss in your presence with any representative of A & P price at which A & P would or intended to sell private label milk out of the store? A. No, sir. I Emphatically no.

* * * * *

[955] * * *

Q. Isn't it true that you tried to persuade Mr. Schmidt that other dairies might not give him reliable prices in the sense that they might come in with a low price originally and then try to jack up the price later on? A. Well, I told Mr. Schmidt. I wasn't trying to persuade him of anything, but I told him that somebody might bid on this thing on a basis of trying to get the business at any cost and it wouldn't be a realistic bid based on their cost but hopefully if they got the business they could sometime later on perhaps get the thing into a profitable way and this has been done many times in business dealings and I did tell him that, and he said he would recognize that if that was what it was. He knew those things existed and he recognized it. So I didn't try to discourage him from putting the thing out because he already had put it out for bids so he said.

Q. Now, when you learned that an A & P had received a lower quotation were you and Mr. Minkler somewhat embarrassed about that fact? A. Yes.

Q. And did you discuss how you would explain to A & P that they had received a quotation which apparently was greatly at variance with the one that you had submitted? A. I don't remember that we discussed it. * * *

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[962] * * *

Q. So he didn't use the term anyhow accounting with reference to the Borden quotation, that being based on anyhow accounting? A. That is right.

Q. Now, wasn't it a normal business practice in the dairy industry to meet competitive prices? A. Yes.

Q. And you did that not just with respect to any offer that you might make to A & P but with all of your customers, isn't that correct? A. Yes.

Q. And did it happen from time to time or fairly frequently that a customer would say that they could get a better price elsewhere and you would meet that price? A. Not necessarily. We could elect whether we wanted to or not.

Q. But when that did happen though, did you ask the customer for some— A. Proof.

Q. Proof in what form? A. Well I suppose an invoice. You see, none of that applied to me. I am just speaking about what was done in the wholesale [963] division and I know it was done. They didn't meet all competition.

Q. But when they did— A. When they did they wanted proof usually.

Q. What kind of proof? A. Either an invoice or a bill that they had. Usually milk is sold to most people on the basis of cash and they'd have a cash sales ticket that would cite that. But I don't think we met it in the majority of cases even with single accounts because a lot of funny

things were going on and you couldn't believe a lot of the things that the grocer would tell you.

Q. But whenever you did do it you made sure that you were actually meeting the competitive price by getting some documentary evidence? A. I should presume our wholesale department did that, yes. I didn't do it myself because I didn't have those accounts.

Q. Now, did you ever, either before or after you submitted Borden's final quotation to Elmer Schmidt, did you ask him or anyone from A & P how Borden's bid compared with the competitive offer? A. No.

Q. Did you ask the identity of the competitive offerer? A. Not in so many words, no.

[964] Q. You tried to find out indirectly, is that it? A. Yes.

Q. Now, I think you have testified that you not only did not ask Mr. Schmidt about how your bid compared with the competitive bid, but that he never volunteered that information, is that correct? A. Well, only in the manner in which I have testified.

One time he said, "You are not in the ball park. You are way off." And 50,000 wouldn't make it.

Q. I will come to that. A. And all these other kind of things which would give you some inkling perhaps of what was going on.

Q. But that $50,000 remark was the only clew you had? A. Well, no. There were others. Particularly towards the end when he said "Sharpen your pencil a little bit."

Q. I am going to come to that.

Now, you didn't answer the question, however, that I had previously posed and I would like if his Honor would please instruct the witness to try and be responsive to the question asked. I would like the question repeated.

Mr. White: I think the answer was responsive. If your Honor is going to be asked to rule on it.

Judge Hinkes: Let's hear the question and answer.

(The record was read by the reporter.)

Mr. McInerney: I think that is the kind of [965] question that can be answered yes or no.

By Mr. McInerney:

Q. May I put that question to you again, Mr. Tarr, as to whether Mr. Schmidt ever volunteered to you what the competitive offer was? A. No.

Q. Now, you did try to get a clew from him as to what the competitive offer was, is that correct? A. Yes.

Q. Did he ever in any way suggest to you what the Borden quotation should be? A. No.

Q. In any way at all? A. Well, only by inference, as I testified before. But if the answer is yes and no, inference isn't the whole thing and I will say no he didn't.

Q. Well, now, let me read to you from your deposition of December 2, 1971.

Mr. Mathias: What page please?

Mr. McInerney: 511, it commences toward the end of page 511 and goes through the top of page 513.

"Question: Now when you made this final quotation—and when I speak of final quotation I mean it is $120,000 saving over—prior to your making that offer did Mr. Schmidt in any way suggest to you what your quotation [966] should be?

"Answer: No.

"Question: When you gave that final quotation to Mr. Schmidt at that time or thereafter did he tell you that you had actually met the competitor's price?

"Answer: No. He never said that."

Mr. Mathias: Your Honor, I would object. I think the quotation reads exactly, "Not—no, he never said that."

Mr. McInerney: That is right, Mr. Mathias.

Judge Hinkes: Very well.

Mr. McInerney: "Question: Did you ask Mr. Schmidt what the competitive offer was?

"Answer: No.

"Question: And did he volunteer that information to you?

"Answer: No, never.

"Question: You never received that information?

"Answer: No."—

Mr. Mathias: Your Honor, I would like to know whether this is leading. I don't know whether I am entitled to an objection or not. I didn't see anything read so far that contradicts anything this witness states, and a great deal of the deposition transcript is being read into this record and I don't see any basis being laid for it, so I think I am entitled at this point to be told where it's leading to.

[967] Mr. McInerney: Haven't come to my question yet and I think this is the appropriate time—

Judge Hinkes: But is the reading of that lengthy portion of the transcript necessary for the question?

Mr. McInerney: Yes, it is, sir and it's not very much longer.

Judge Hinkes: Very well.

Mr. McInerney: "Question: You never received that information?

"Answer: No. I don't know now.

"Question: Did you ask who the competitive bidder was?

"Answer: No.

"Question: And he didn't tell you this either?

"Answer: No.

"Question: Did you ask him whether the price that Borden was quoting was above the competitor's price or below the competitor's price?

"Answer: No.

"Question: Or precisely at the competitor's price?

"Answer: No.

"Question: You didn't ask him any of those things?

"Answer: No.

"Question: And he didn't volunteer any of that [968] information?

"Answer: No, he didn't."

By Mr. McInerney:

Q. Now, in the course of answering those questions, Mr. Tarr, did you ever make any reference to the remark that you have just referred to, something about sharpening your pencil? A. I didn't at that time.

Q. Did you in the course of testifying either at this deposition or your prior testimony in December of 1969 ever mention those words? A. I don't think I did but I am not sure. I don't think I did. This was so, though. I don't think the thing ever got around to questions that would bring that about. Those answers I made would be the same answers that I am making right now except through inference I brought this inference into the thing. That's the only difference here in my statements now and the statements I made then is my inference.

I answered you when it was yes or no, I answered you no on all counts there.

Mr. Mathias: Your Honor, before there are any more questions I have an objection. There was nothing read by Mr. McInerney that in any way has contradicted what this witness has testified today

and I move that the portion of the transcript from the deposition hearing which Mr. McInerney has [969] read into this record from the bottom of page 511 to the top of page 513 of the deposition be stricken.

Mr. McInerney: Your Honor, I have not only this part of the deposition that I would like to refer to, I have a series of other questions along the same line and I think that when it is all developed you will see the connection between this prior testimony and the testimony that the witness is now giving and I think that I should not be so limited on a matter of this importance.

Mr. Mathias: Your Honor, what he has done is to put a portion of the deposition transcript into evidence in this case without laying any foundation that he has exhausted the recollection of this witness or that the witness's present testimony is in any way contradictory to that prior testimony, and I believe that whether it's on cross or what the nature of the interrogation is, the same rules apply to introducing prior deposition testimony as was applied to complaint counsel at the time that Mr. Minkler testified.

Mr. McInerney: I don't think that the same rules apply on cross-examination as they do on direct examination and, as I recall, your Honor allowed Mr. Mathias to in fact introduce portions of the deposition testimony in evidence over my objection.

I think that on this aspect of the case in cross-[970] examination I should not be hampered in this manner.

Judge Hinkes: Well, there is no reason to get involved with the recitation of a deposition which is consistent with the testimony that has been given. That would be a surplusage of the record and certainly to be avoided if it's at all possible.

Now I have heard the recitation of the transcript and I have also listened to the testimony of the witness, and I must say that I see nothing inconsistent. He was not asked the identical questions that he is being asked now.

Mr. McInerney: Your Honor, this remark was first injected into this case—

Judge Hinkes: Which remark are you speaking of?

Mr. McInerney: This "Sharpen the pencil" remark.

Judge Hinkes: That is right.

Mr. McInerney: —after years of pre-trial depositions and so on—

Judge Hinkes: But that was hardly necessary to read the depositions. I think had you asked the witness simply had you ever mentioned this sharpening of the pencil before in this proceeding he undoubtedly would have answered no and that would be the end of it and you wouldn't have to read the deposition.

Mr. McInerney: You Honor, I will at the [971] appropriate time argue whether or not there is inconsistency in the prior testimony, but I must be able to ask the witness questions about the prior testimony before I can make that argument. I intend to lay that foundation.

Judge Hinkes: That is what I was referring to before when I said that I see nothing inconsistent. He was not asked and he did not deny at that time anything concerning the use of the words "Sharpen the pencil."

Mr. McInerney: Because the words had never been mentioned, your Honor, and if I may, I would like to point out that he was not asked anything

about it yesterday when he volunteered the following, and this is the problem.

The remark first came about at page 884 of the record here. Mr. Mathias asked a question which is simply as follows:

"You stated paper gallons. Did you mean the glass gallon"?

And then he said, "Answer: Yes. We left the glass gallons out and then sometime right about that time Elmer said to me "Look, sharpen your pencil a little bit because you are not quite there," meaning what the other party was bidding I guess.

So we developed the new one and I think it came out a little higher because we found some products" —and I think the witness said "By products." Is that right, Mr. Tarr?

[972] The Witness: Yes, sir.

Mr. McInerney: —"found some byproducts that we could give a little better deal on and we did."

Now, it wasn't in response to any question asked in this proceeding either.

Mr. Mathias: Your Honor, I object to the way Mr. McInerney has characterized the record. He has left out the question which Mr. Tarr has answered. He has read a contradicting statement which complaint counsel read into the record.

The actual question on page 884 was, "What occurred after this communication from Mr. Schmidt?" and "Answer: We changed the quote and left out the paper gallons and developed the things along the lines"—and complaint counsel interrupted to clarify the record stating, "You stated paper gallons. Did you mean the glass gallons?

"Yes. We left the glass gallons out and then sometime right about that time Elmer said to me

'Look, sharpen your pencil a little bit because you are not quite there'," and I believe that is very responsive to the question which was, "What occurred after this communication from Mr. Schmidt"?

Judge Hinkes: Well, in any event, this comes back to what I said before. The questions that you are asking this witness now are not the same questions that were asked of him yesterday. The question asked of him was what took place. [973] Today you are asking him was such and such said. You are pinpointing your question to a specific utterance and he denies that utterance.

Now there is no necessary inconsistency in that situation.

Mr. McInerney: Well, I am not sure, your Honor, exactly what the witness is going to say with respect to this, and I think if it is true that, as I think I can represent to your Honor, this whole course of dealings has been testified to several times and a lot of questions were asked on every aspect of it, and now for the first time the witness believes he remembers a remark that was never made before, I think I am entitled to examine into that in some detail.

Judge Hinkes: Yes, you are, but it wasn't necessary to read the deposition. That is my only point. All you need do I say is ask this witness, not merely limit it to the deposition, "Did you ever mention this business of sharpening the pencil before yesterday," and the witness will give us a straight answer to that.

And I will ask Mr. Tarr that very question.

Have you ever employed that expression about sharpening the pencil, a remark, that you say Mr. Schmidt used, before yesterday?

The Witness: Not in any deposition before the [974] FTC.

Judge Hinkes: In any investigational interview or something of that sort.

Mr. Mathias: He was never interviewed, sir, other than the deposition of last December and an investigational hearing in 1969.

Judge Hinkes: Did you mention that in the investigational hearing of '69?

The Witness: No, I don't think I did.

Judge Hinkes: Very well.

Now that is the inconsistency if you want to argue it.

Mr. McInerney: I think it goes further, though, your Honor, if I may continue.

Judge Hinkes: You may.

By Mr. McInerney:

Q. Didn't you on prior occasions testify that the only clew you had was this $50,000 remark that you attributed to Mr. Schmidt? A. I don't know that.

Q. Now, in an attempt to refresh your recollection with respect to that, I would like to read from pages 516 and 17 of the deposition testimony.

Mr. Mathias: Your Honor, suppose he starts by showing those pages to the witness and seeing if the witness—

[975] Mr. McInerney: No, I would like to get this in the record. I think it's important.

Mr. Mathias: If it's to refresh his recollection, your Honor, it should be proceeded with in that manner first.

Mr. McInerney: Well, if it also—

Mr. Mathias: Excuse me. I would like to finish.

If it's for the purpose of introducing this information into the record, well then, I think that he must follow the same rules that complaint counsel had to follow last week and he must show that the witness's recollection has has been exhausted or that he has made an inconsistent statement.

Judge Hinkes: I presume, Mr. McInerney, you are going to try to demonstrate to the witness some inconsistency, is that right?

Mr. McInerney: In part, your Honor.

Judge Hinkes: The witness should be allowed to see the inconsistency first of all.

Mr. McInerney: Your Honor, I really don't believe that I need to follow that approach. I think that whatever the witness says at this point in time we have this prior testimony which I believe is relevant to whether or not his memory is entirely accurate with respect to this.

Judge Hinkes: No. The witness is entitled to be confronted with the alleged inconsistency and not simply to be told of the inconsistency which may or may not be exactly true.

[976] Mr. McInerney: I will do whatever your Honor says of course, but I submit to you that I have a right to have this record show the alleged inconsistency so that I can refer to it at a later date.

Judge Hinkes: After the witness has examined the so-called inconsistency. Perhaps he has some sort of explanation and then you can state for the record what that inconsistency is and make your argument on it.

Mr. McInerney: All right, your Honor.

I have only one copy of this.

Testimony of Gordon Tarr

By Mr. McInerney:

Q. Sir, would you read on page 516, line 16—and so I won't be accused of leaving anything out—down to page 519, line 12. There is some colloquy in there that I would have left out if—

> Mr. Mathias: Your Honor, I believe first of all it should start with line 4 for the very reason that it should be pinpointed which meeting was being discussed here.
>
> Mr. McInerney: Your Honor, there will come a point in this proceeding when I will object, and I think that point has now been reached, that Mr. Mathias's arguments are suggestive to the witness and I think that he ought to state his objection without doing that.
>
> Mr. Mathias: Your Honor, I will state my objection. I object to Mr. McInerney using a portion of the record [977] dealing with one meeting to attempt to contradict a statement which Mr. Tarr has testified had occurred at a later date.
>
> Mr. McInerney: As you see, this is the kind of thing—I am not refusing to let the witness read from line 4, which is what you are suggesting. What I do object to is your characterization of what that shows. I think that is entirely unnecessary.
>
> Judge Hinkes: Well, instruct the witness exactly where he should be reading, if you will, Mr. McInerney, and once again remind the witness of what he is reading this portion for.
>
> In other words, your pending question which has to do with the $50,000.
>
> Mr. McInerney: Yes and whether that was the only clew.
>
> Judge Hinkes: Yes.

Testimony of Gordon Tarr

By Mr. McInerney:

Q. Commencing at the top of page 516, Mr. Tarr, would you read that, and take your time. A. Yes.

Mr. McInerney: Incidentally this transcript will show that Mr. Mathias at a certain portion of it referred the witness to his prior testimony in the investigational hearing, and I have that here too, which I would be [978] happy to show the witness so that he has it all in front of him.

Judge Hinkes: Dealing with the same question, you mean?

Mr. McInerney: Yes, sir.

Judge Hinkes: If it is a question of refreshing the witness's recollection you may show him.

[979] Mr. Mathias: Your Honor, I don't have a copy of that with me at the moment and while the witness is reading the other transcript I wonder if I might have a brief look at this.

Mr. McInerney: Sure. That is our only copy of that.

Mr. Mathias: Thank you.

The Witness: I have read it.

By Mr. McInerney:

Q. Now, would you also read what Mr. Mathias referred to in the course of that which I think he referred you to something from pages 440 and 441 of the investigational hearing transcript.

Have you read this now, sir? A. Yes.

Mr. White: Might we have the question again? It has been so long I have forgotten it.

Judge Hinkes: You might ask it again, Mr. McInerney.

Testimony of Gordon Tarr

By Mr. McInerney:

Q. Now, isn't it true, Mr. Tarr, that in the investigational hearing transcript in 1969, and in the deposition of 1971 you testified rather extensively with respect to your conversations with Elmer Schmidt on this subject of private label and stated that the only clue you had [980] with respect to what the competitive offer was was this reference to $50,000 being a drop in the bucket?

Mr. White: I would like to raise an objection. Just so nobody will complain when I state my reasons, it might be well if the witness leaves the room.

Judge Hinkes: Mr. Tarr, would you be good enough to step out of the room for just a moment?

The Witness: All right.

(The witness withdrew from the Courtroom.)

Mr. White: Your Honor, I object to the question as an improper summarization of the testimony that has been shown to this witness. The transcript of the deposition, starting at page 516, deals with a conversation, a particular conversation that he had with Mr. Schmidt which, according to his testimony, was an entirely different conversation than the one about sharpening the pencil that occurred before that.

It occurred at the time that he was called over there and told that they were shocked and all this sort of thing as a result of the competitive price, and that is the conversation at which the $50,000 was mentioned.

The conversation concerning the sharpening of the pencil happened several days later at least. It was after another two or three meetings in between time and to, in effect, ask him based on this and ask him a summary question which assumes that this is con-

tradictory of what he said I [981] think is improper, improper summarization.

Judge Hinkes: The question is improper. The question that should be asked of the witness now is the same question that you asked him before he read these documents, whether or not the $50,000 saving was the only reference to saving or bidding or anything else that you have in mind, Mr. McInerney, in view of what he read in those documents.

He will either say that his testimony now ought to be changed or else he will say no, in which case you can introduce the so-called inconsistent statement to affect his credibility and that is all there is to it.

You should not ask him a question which depends upon your characterization of what he said. That is not the issue.

The issue is what is the correct answer to your preceding question. He answered it once. You are now attempting presumably to demonstrate that that answer is not consistent with other answers that he gave earlier.

Now, having read these other answers, you ask him that same question once again, and if he changes his testimony, well and good.

Then we have a change in his testimony and that may be argued affecting his credibility. But, if he says no, he maintains his original position and you think that earlier testimony is inconsistent, you offer that inconsistent portion [982] in evidence because it is impeachment evidence and that is all there is to it.

Mr. McInerney: Your Honor, I tried not to have to summarize the testimony for myself by reading it to the witness and I was not permitted to do that, so I really think that the objection now that I am

somehow improperly summarizing it is an attempt to box me in on the cross-examination of this witness.

Judge Hinkes: No. I see no boxing in of any kind. You are still permitted to ask the original question you asked. You are still permitted to get the witness to contradict himself. You are still permitted to demonstrate that he contradicted himself earlier. That is your case, as I see it, and I see nowhere any boxing in.

This is solely for the purpose of establishing an inconsistency. Therefore, ask him the question once again and see if he will now be inconsistent.

Mr. McInerney: I should point out to Your Honor that whether or not there is a direct inconsistency here, and I think there is, but even if there were not, the mere fact that we had such extensive testimony on this matter so often and in such detail and that this was not mentioned I think has a bearing on whether or not this actually happened.

Judge Hinkes: I don't dispute your right to make that argument. I am only concerned with the mechanics now.

[983] Mr. McInerney: Yes, sir.

Judge Hinkes: And if he does then say that he sees nothing inconsistent in his previous testimony with what he is testifying today, then you simply offer this previous testimony and argue its inconsistency with what he testified today. That is all. You needn't go into any great length about it here with this witness at this time. You simply get him to state whether or not there is an inconsistency. That is all.

Mr. McInerney: I don't think the witness is going to state that there is an inconsistency.

Judge Hinkes: Why should we speculate whether he does or not? You still have the argument open

to yourself. In other words, whether he believes it inconsistent or not is not the final answer. The final answer will be mine, based upon the argument that you can advance and that will be in your brief.

Mr. McInerney: I have no choice, Your Honor.

Mr. Mathias: Shall I invite Mr. Tarr back in?

Judge Hinkes: Yes, please.

(The witness re-entered the Courtroom.)

By Mr. McInerney:

Q. Mr. Tarr, would you agree that your memory of the private label negotiations that led up to this final quotation from Borden to A&P, that your memory with respect to all those [984] events back in 1964 and 1965 is not perfect? A. I believe everything I testified and said definitely that was so was so. I referred to notes that I had taken in many instances.

Q. But my question was whether— A. There is a lot of things I have left out in the whole thing. Maybe today and the other two times I didn't. There were some things that might have occurred that I could look up or that I could remember suddenly that did happen. I didn't just remember this sharpening of the pencil deal. I knew that all the time. It just never came about that I testified, and there are probably many other things in my testimony that wasn't a complete testimony of everything if we didn't get on those subjects.

I won't say that there wasn't other things I didn't say. I will say that. They could have been left out of the thing that I could have said and it is in my mind. It is in my memory.

Q. Well, I think you told us yesterday at page 873 of the transcript, "I may not have these things in proper sequence." A. This is correct.

Q. Would you agree with this today? A. Yes.

* * * * *

[988] Mr. White: Yes.

Judge Hinkes: Well, then, shall we say that if the notes are not received, then, by Mr. McInerney one week from today that we can assume there are no such notes?

Mr. White: Well, I will report, Your Honor. As soon as I get back I will report on it.

Judge Hinkes: Very well. That is fine.

Mr. White: We don't need to depend on my lack of saying anything to determine whether or not we get the notes.

Mr. Mathias: Your Honor, I would take it that since there has been a specific request by A&P that these notes would be made available to Complaint Counsel as well since we were not aware of the existence of any such notes in the event they are made available to A&P Counsel.

Mr. White: They will be available to all three parties.

Judge Hinkes: Fair enough. We'll have a report, then, from you when we resume next week, I hope.

Mr. White: Yes, Your Honor.

Judge Hinkes: Very good.

You may continue, Mr. McInerney.

By Mr. McInerney:

Q. Now, did reading those portions of the transcript that were shown to you, Mr. Tarr, refresh your recollection that in arriving at this $820,000 quotation the only clue that you had [989] was this reference to $50,000 savings or possible savings by elimination of in-store promotion? A. Yes, but that was only a drop in the bucket.

Q. I am sorry? A. The $50,000 was only a drop in the bucket as I testified.

Q. And that was the clue that you were working with when you came up with the $820,000? A. This is right; this is correct.

Q. Now, I think you have told us that Elmer Schmidt never suggested what your final quote should be; is that correct? A. That is right.

Q. The reference that you had made before to some kind of a price change that may have had some connection with this remark about sharpening your pencil, that was to by-products, wasn't it? A. It was a differential. It was a differential on the thing—you mean the changes that were made, if any, yes, it was on the by-products, any changes.

Q. Now, the actual final offer that was submitted to A&P supposedly resulted in a cost saving to A&P of $820,000; isn't that correct? A. I am not sure but I think so.

* * * * *

[1001] A. That is correct, approximately, and—whether the little addition or not, it is still approximately $820,000.

Q. And that was true throughout? A. Yes, but there could be a little difference in the approximation.

> Judge Hinkes: But it was still approximately. Is that what you are saying?
>
> The Witness: Yes, still approximately. In my opinion, it was a little more but still approximately $820,000.
>
> Judge Hinkes: Do I understand your testimony that the result of Borden's work following Schmidt's request to sharpen their pencils was not a material change in the $820,000 figure of savings but only a slight, if any, change?

Is that what you are saying?

The Witness: I am saying something like Mr. McInerney had mentioned. It might have been $5,000, it might have been $8,000, it might have been more or less.

Judge Hinkes: And you regard that figure as being approximately $820,000?

The Witness: Yes.

By Mr. McInerney:

Q. And you don't presently recall what it was? A. No, that is correct.

Q. But you would agree with his Honor's question that it was insignificant in your mind? [1002] A. It was insignificant in the all-over amount.

That is what Elmer said, that it was only a small amount. "Just sharpen your pencil a little bit. There is only a small amount."

Q. Now, you did testify previously, did you not, that Elmer did not tell you what the other quotation was? A. Yes, sir, I have said that many times.

Mr. McInerney: May we take a short recess, Your Honor?

Judge Hinkes: Very well. We will be in recess for five minutes.

(A brief recess was taken.)

Judge Hinkes: You may continue, Mr. McInerney.

By Mr. McInerney:

Q. Mr. Tarr, is it still your best recollection that at some point in these negotiations Mr. Schmidt said to you, "Sharpen your pencil"? "You are not quite there yet." A. Yes, that he said to me on the telephone.

Testimony of Gordon Tarr

Mr. McInerney: Your Honor, we will offer as our RA&PX 7, pages 511 through 520 of the deposition of Mr. Tarr, taken on December 2 and 3 of 1971, and incorporated in that is a reference to his prior testimony at the investigational hearing. The reference is only to pages 440 to 441 of that ex parte investigational transcript, but for the sake of completeness, I think, so that there won't be any * * *

* * * * *

[1006] * * *

By Mr. McInerney:

Q. Now, Mr. Tarr, when—

Judge Hinkes: Pardon me. Just for the record, I think we should state that the document in question is not being submitted at this time. Permission is granted to Mr. McInerney to submit a copy of the pages which have been received in evidence and you will do so, I presume, Mr. McInerney, within the next week or ten days?

Mr. McInerney: Oh, yes.

Judge Hinkes: Very well.

By Mr. McInerney:

Q. Mr. Tarr when you submitted your final quotation to A&P, did you feel that Borden actually had to meet or beat the prices being offered by the competitor? A. Did I feel at the time we brought the figures over I thought we met them? Probably. I don't know as I had any feeling about whether we had to meet them. I was quite sure this is apparently what Mr. Schmidt had been trying to arrive at.

Q. Well, my question was: Was it your feeling that you

actually had to meet those prices being offered by the competitor? A. You mean prior to that time?

[1007] Q. At any time. A. Well, I never felt that we were going to lose the business. I felt that somehow we were going to keep the business. I felt a little confident at that stage of the game that we would.

Q. Well, my question, Mr. Tarr, was: Whether in giving your final quotation— A. At that time?

Q. In giving your final quotation for private label milk to A&P, did you feel that you actually had to meet the competitor's quote? A. Had to beat the competitor's quote? No, I didn't.

Q. I am sorry. I didn't hear something. A. I didn't feel that we had to beat the competitor's quote.

Q. I used the word "meet". A. "Meet". Well, I don't think I had any feelings along that line at all. I thought this was it. This was what we had arrived at. I didn't feel—I think prior to that time I felt perhaps that we didn't have to meet this but I thought we were meeting it.

Q. Didn't you feel that you didn't have to actually meet the competitor's quote but only come close to it? A. Well, I thought if we were close to it it would be all right, yes.

[1008] Q. So is it your testimony that in submitting this private label quotation to A&P you did not feel that you had to actually meet the competitor's quote? A. Well, I don't imagine—perhaps we did have to actually meet it. We had to be right up there.

Q. But you thought you had some leeway? A. Possibly, yes.

Q. Well, is it possibly or do you recall that you didn't feel that you had to actually meet— A. Well, you are asking how I felt. Now, at that time I felt that we had met the proposition, that we were at least as high as the other party, and that there was no problem left.

Now that is how I felt. You are asking how I felt at that time. There were times prior to that in the discussion, all this discussion, when I felt perhaps if we didn't get quite up to the bid that we would still retain the business but at that time my feelings were that we had met it so I can't quite follow your question.

Q. My question is very simple. It is whether at the time you submitted the final quote you felt that you actually had to meet the competitor's quote. A. I felt we were meeting it.

Judge Hinkes: Well, did you feel you had to, not that you were or were not, but that you had to?

The Witness: Well, no I didn't feel—if I * * *

* * * * *

[1015] Q. And when you submitted that, did you not know what the relationship was between the Borden offer and the competitor's offer? A. That is right.

Q. Now, did you ever consider getting a letter from Elmer Schmidt or from somebody at A&P with respect to what the competitive offer was? A. No, I didn't expect to get anything like that.

Q. Did you consider inquiring, either at the time that you submitted the final offer or after that, with respect to what the relationship was? A. No.

Q. That wasn't even considered internally within the Borden organization? A. As far as I know it wasn't.

Q. Now, did you or anyone in your presence ever mention to Mr. Schmidt or anyone from A&P that the private label quotation was not cost-justified? A. No.

Q. Did you or anyone in your presence ever mention to Mr. Schmidt or anyone from A&P that these prices would not be made available to others? A. No.

Q. Did you ever, in your discussions with Mr. Schmidt, refer to the Robinson-Patman Act? [1016] A. No.

Q. And did anyone in your presence ever refer to the Robinson-Patman Act in discussions with anyone from A&P? A. No.

Q. Did Mr. Schmidt at or around the time of the submission of this final quotation ask you for a letter stating in words or substance that these prices would be made available to others? A. No.

Q. Are you sure of that? A. Yes, I'm sure of that.

Q. Did he ask you for any kind of a letter or assurance from Borden? A. Well, there was something asked. I can't remember where this thing came from, but there was a letter written. It wasn't that it would be available to everybody.

Q. What was it? A. I just can't remember the letter. The letter has been used in open testimony here in the last deposition I made and it was shown to me and it was my signature.

I didn't author the letter. I don't know who did.

Q. I will show you that letter in just a moment but— A. But maybe that is what you have reference to and someone, I am quite sure someone asked for it and I don't know whether Elmer Schmidt did.

* * * * *

[1025] * * *

Judge Hinkes: Did you intend to convey any message to A&P when you signed that letter?

The Witness: I only signed it because this is the letter that was apparently supposed to go over to A&P. It was prepared for me by somebody.

Judge Hinkes: Did you know the content of the letter when you signed it?

The Witness: Yes.

Judge Hinkes: Very well now. If you knew the content of the letter, then I think that you ought

to be in a position to know your intentions with respect to sending it to A&P, which you, of course, are responsible for.

The Witness: I think it was in answer to a request that A&P made to us, someone in A&P made to us to—I don't know what they asked for exactly—

Judge Hinkes: Well, let me put it to you this way: Was it your intention to comply with the wishes of A&P?

The Witness: Yes.

Judge Hinkes: Very well.

You may continue, Mr. McInerney.

* * * * *

Testimony of Orville Gose

June 21-22, 1973

* * * * *

[1050] Judge Hinkes: I don't know that it does.

Mr. Curnin: And the witness has not yet testified.

Judge Hinkes: I would think, however, that complaint counsel will connect this up to demonstrate its connection with A&P in particular, rather than just a change in selling prices generally. Is that possible, Mr. Mathias?

Mr. Mathias: Yes, sir, we will.

Judge Hinkes: On that condition I think the document can be accepted. Is there any objection, Mr. White?

Mr. White: No, nothing special, Your Honor.

Judge Hinkes: Very well. I shall receive the document subject to the condition I have stated.

(The paper referred to, heretofore marked for identification Commission Exhibit 79, was received in evidence.)

By Mr. Mathias:

Q. Now, Mr. Gose, has the reading of CX-79 refreshed your recollection as to certain cost increases which had been incurred by the Borden Company prior to the date of this document which was May 25, 1966? A. I am not sure I understand that.

Mr. Curnin: Your Honor, I am not sure that the witness has testified that he doesn't have a recollection of increases that were incurred by the Borden Company.

By Mr. Mathias:

Q. Well, do you recall increases in labor costs in the spring [1051] of 1966? A. Yes, I do.

Testimony of Orville Gose

Q. And do you recall that some time earlier Borden had also incurred an increase in Purepak container costs?

Mr. Curnin: May we have that as to point in time, Your Honor?

Mr. Mathias: Your Honor, sometime previously.

Judge Hinkes: Just prior to 1966 is your question?

Mr. Mathias: Yes, sir.

Judge Hinkes: The witness will answer.

The Witness: Yes, sir.

By Mr. Mathias:

Q. And do you also recall, Mr. Gose, as to whether or not Borden at about this time, the spring of 1966 or shortly earlier, had incurred an increase in Social Security tax cost? A. I don't recall that in particular.

Q. Now, Mr. Gose, do you recall having been involved in negotiations with the A&P Company concerning a request by Borden for an increase in private label prices as a result of these cost increases to which you have referred?

Mr. Curnin: I object, Your Honor, to the use of the term "negotiations."

Judge Hinkes: Well, that is up to the witness to tell us whether it is that or not. The question is entirely proper. The questioner wants to know if the witness was engaged in negotiations.

[1052] *By Mr. Mathias:*

Q. Do you recall the question now, sir, or would you prefer it to be read? A. Do you mind?

Mr. Mathias: May we have the question read?

(The reporter read the question.)

Testimony of Orville Gose

The Witness: Yes, I do.

By Mr. Mathias:

Q. And when did these negotiations start, sir? A. As I recall, I presented the price increase to A&P around May of 1966.

Q. And did you personally make the approach to A&P? A. Yes, sir.

Q. And who did you contact at A&P, sir? A. I contacted Mr. Elmer Schmidt.

Q. And what occurred at this meeting?

Judge Hinkes: Just a moment. When you say you presented the cost increases to Mr. Schmidt, what cost increases are you referring to now?

The Witness: I submitted cost increases to Mr. Schmidt on Borden and private label milk products.

Judge Hinkes: Yes, but what cost increases of Borden's did you submit to Mr. Schmidt?

The Witness: The cost increases—

Judge Hinkes: Let me make it a little clearer. Did [1053] you submit to Mr. Schmidt a recitation of Borden's cost increases or a statement of A&P's cost of milk and its increase?

The Witness: I submitted to A&P the increase to their existing price of private label and Borden milk at that particular time.

Judge Hinkes: Did you include any statement of Borden's cost increases in addition to the increase in the price that was going to be charged to A&P or that was being proposed to be charged to A&P?

The Witness: I submitted the document that I just read.

Judge Hinkes: This Commission Exhibit 79 you mean?

The Witness: Yes, sir.

Judge Hinkes: You actually transmitted that to Mr. Schmidt, is that what you are saying?

The Witness: Yes, sir.

Judge Hinkes: I see. Very well. Thank you. You may continue, Mr. Mathias.

By Mr. Mathias:

Q. Now, Mr. Gose, do you recall what Mr. Schmidt said to you at this meeting? A. Mr. Schmidt at my meeting with him did not acknowledge the price increase. He indicated that the matter would have to be discussed with his superiors.

Q. Was this both as to the private label and to the Borden [1054] label? A. At that point, yes.

Q. And what did you say to Mr. Schmidt, sir? A. As I recall, I indicated that I would wait for his reply and hopefully would hear from him soon, something of that nature.

Q. And what happened next, sir? A. Shortly after my visit to Mr. Schmidt I received a telephone call from Mr. Schmidt at which time he stated that they would not accept this increase on the private label. They would with regard to the Borden label.

Q. So were the Borden label prices then increased by this amount, sir? A. To my recollection they were.

Mr. Curnin: May we know the amount of the increase, Your Honor?

By Mr. Mathias:

Q. Showing you Commission Exhibit 79, was the amount the same as shown on that Exhibit, sir?

Mr. Curnin: May we know, Your Honor, whether the witness has any recollection on this matter?

Judge Hinkes: I don't know that we want to tell

Mr. Mathias what questions to ask. You can cover that in your cross-examination.

Mr. Curnin: Yes, Your Honor.

The Witness: To my recollection this is the increase [1055] which was passed on to A&P with regard to the Borden label.

By Mr. Mathias:

Q. That is the increase indicated on CX-79? A. Yes, sir.

Q. At the time you visited Mr. Schmidt, who was present at the meeting? A. Obviously I was present and I cannot recall if anyone else was present or not.

Q. The only ones you can recall are yourself and Mr. Schmidt at this time? A. Yes, sir.

Q. Did you report the results of your meeting to your superiors, sir? A. Yes, sir, I can.

Q. Now, Mr. Gose, subsequent to the notification from Mr. Schmidt that he would accept the increase on the Borden label, but not on the private label, did you continue to negotiate with A&P for an increase in the private label prices? A. I do not recall having any further discussions in the immediate future or thereafter.

Q. Well, were there any at any period thereafter, sir? A. Yes, sir, there was one other occasion later.

Q. And when was this, sir? A. In the early part of 1967.

Q. This was approximately a year later, sir? [1056] A. Approximately.

Q. And what happened on this occasion, sir? A. A price increase was presented to Mr. Schmidt in the spring—I would have to guess. Around March of 1967.

Q. And was this related in any way to your earlier request for a price increase? A. Yes, I am sure it was related to price increases that had taken place.

Q. This was the cost increases that had occurred back in 1966? A. To my best recollection, yes.

Q. Now what occurred at this time? Did you meet with Mr. Schmidt at this time? A. Yes, sir.

Q. This is in March of 1967? A. In that general area of time.

Q. And do you recall if anyone else from Borden Company was with you at this time? A. At this particular time I couldn't say for certain if anyone was with me from Bordens.

Q. And do you recall who you met with from A&P? A. I met with Mr. Elmer Schmidt.

Q. Now what occurred at this meeting, sir? A. I presented Mr. Schmidt with a price increase.

Q. And what was Mr. Schmidt's reaction, sir? A. I recall him indicating that he would discuss it with his [1057] associates and I don't remember him acknowledging anything other than the fact that he was going on vacation and I might have to deal with a Mr. Bob Witzke.

Q. How do you spell that, sir? Is that W-i-t-z-k-e? A. That is close. That is close.

Q. Did you have any subsequent dealings with Mr. Schmidt or Mr. Witzke concerning the request for a price increase? A. There was a request for a breakdown or an analysis of certain labor cost factors that were involved.

Q. And what did you do at this point, sir? A. Oh, in acknowledging this request, I recall Mr. Malone preparing a rather detailed breakdown of labor changes that had taken place.

Q. And was this then submitted to A&P, sir? A. As I recall, this information was made available to A&P.

Q. And what occurred next then, sir? A. Shortly thereafter it was requested that we discuss the matter with Mr. Ira Bartels.

Q. What was Mr. Bartels' position at that time if you know, sir? A. Mr. Bartels examined the figures that Mr. Malone had prepared. He asked certain questions regarding the labor increased involved. I recall that he raised a

question with regard to container expense. That I remember.

Q. And did he indicate whether or not the price increase was [1058] acceptable to A&P, sir? A. He indicated that it was as proposed not acceptable, and ultimately in the overall conversation he did indicate that an increase in the area of around two mills per point seemed reasonable, words to that effect.

Q. And what was Borden's reaction to this suggestion, sir, or your reaction?

Mr. Curnin: Your Honor, instead of having indications and reactions, may we have the substance of the conversation?

Judge Hinkes: Yes. Before we go to that though, you say that Bartels suggested this two mills instead of what?

The Witness: Instead of the increase that we had submitted or put through to them.

Judge Hinkes: And was that increase 3⅓ mills approximately as noted on this Commission Exhibit 79?

The Witness: Not on that report or document, Your Honor.

Judge Hinkes: What was not on this document?

The Witness: There was another—

Judge Hinkes: No, I am only referring to the figure. Was the increase that Borden requested of Bartels the same figure that is on this document, approximately 3⅓ mills?

The Witness: As I recall, it would be approximately that figure there. I don't remember if it was exactly that figure.

[1059] Judge Hinkes: All right.

Testimony of Orville Gose

By Mr. Mathias:

Q. Mr. Gose, I hand you Commission Exhibit 101A and B, and ask you if you can identify this document, sir.

Are you familiar with this document, sir? A. Yes, sir.

Q. And what is it, sir? A. This document was presented to Mr. Schmidt by me in March of 1967.

Q. Now does this indicate the amount which you were seeking insofar as increased private label prices were concerned in the spring of 1967? A. Yes, sir.

Q. And after Mr. Bartels stated that a two-mill price increase might be acceptable, what did you say to Mr. Bartels, sir? A. I stated that we appreciated our audience with him; that I would have to return to my office and discuss the entire matter with my superiors.

Q. Who were your superiors at that time, sir? A. As I recall, at that time I discussed the matter with Mr. Dave Patterson, who was then president of our new district.

Q. And he was residing in Columbus, Ohio, I believe? A. Yes, sir.

Q. And what occurred next, sir? A. I received knowledgement from Mr. Patterson and we placed this [1060] increase into effect.

Judge Hinkes: Which increase?

The Witness: The approximately two mills, Your Honor.

By Mr. Mathias:

Q. The increase suggested by Mr. Bartels? A. Yes, sir.

Q. Now do you recall what Mr. Bartels' position of employment was with the A&P Company at this time? A. I recall him being head buyer for the Chicago unit of the A&P Company.

Q. He was the superior to Mr. Schmidt? A. Yes.

Q. Now, what part did Mr. Joseph Malone play in the

negotiations with A&P concerning this request for a price increase? A. Mr. Malone prepared the background data for these increases and he also prepared the additional information as requested by Mr. Bartels and Mr. Malone attended the meeting with Mr. Bartels and myself. Mr. Malone was present.

Q. During the course of these negotiations did you consult with Mr. Malone? A. In what regard, sir?

Q. In regard to the nature of the price increase request to A&P? A. I am sure I consulted with Mr. Malone with regard to the information that Mr. Malone prepared, the labor increase cost [1061] information. I don't remember anything specific about the discussion that I can recall.

Q. Now, Mr. Gose, when Borden had originally incurred these cost increases in the area of labor and container costs, did Borden pass on these cost increases in its pricing to other customers in the Chicago region? A. Yes, sir.

Q. And I believe you have already stated that in the spring of 1966 you passed these cost increases on to A&P in connection with your Borden label sales to A&P Stores, is that correct, sir? A. I wasn't concentrating on that question.

Mr. Mathias: Would you reread the question?

(The reporter read the question.)

The Witness: We passed the increase on to all other store customers.

By Mr. Mathias:

Q. Now in the course of your dealings with Mr. Schmidt did you inform Mr. Schmidt that these cost increases had been passed on to your other customers? A. Yes.

Judge Hinkes: When you speak of the cost increases having been passed on to other customers,

what cost increases now are you referring to? Is that the 3⅓ mills or whatever the amount was, or is it the two mill cost increase or just what is it?

[1062] The Witness: In '66 that was the three-mill increase, Your Honor.

Judge Hinkes: And in '67 was there another cost increase passed on to your other customers in a larger amount or an additional amount?

The Witness: In '67, as I recall, our cost increase didn't come until a later period during that year.

Judge Hinkes: Well, let me try to be a little clearer. When you spoke to Mr. Schmidt in 1966, around May, you told him and showed him a cost increase of approximately 3⅓ mills per point?

The Witness: Yes, sir.

Judge Hinkes: And if I understand your testimony, that cost increase was passed on to your other customers at that time in the form of an increased price per point to them.

The Witness: Yes, sir.

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[1076]

AFTERNOON SESSION

1:15 p.m.

Judge Hinkes: Mr. Mathias?

Mr. Mathias: No more direct, Your Honor.

Judge Hinkes: Mr. White?

Cross-Examination by Mr. White:

Q. Mr. Gose, did you have any internal considerations within Borden in which you participated shortly after the time that Borden started serving A&P with private label milk in the Chicago area as to offering private label at

substantially the same prices that you were selling to A&P to other customers in the Chicago area? A. Yes.

Q. And with whom did you have these discussions at Borden? A. As I recall, they were discussed with Mr. Minkler and with people from our legal department.

Q. From the Borden Law Department? A. Yes.

Q. And what were the conclusions of those discussions, can you tell us? A. The conclusions were that we were told that we should not use this price in the solicitation of other accounts because our price to A&P was a meeting of competition price.

Q. Now, did you, however, discuss with other customers or potential customers in the Chicago area the possibility of [1077] supplying them with private label products? A. Yes, sir.

Q. With whom did you have such a discussion, Mr. Gose? A. I recall having discussions with the buyer of the Kroger Company in Chicago.

Q. And what was that person's name? A. The person's name was Mr. Arthur Blair.

Q. In relationship to the time that Borden started delivering private label to A&P, approximately when did this happen? A. I called on Mr. Blair just prior to our introduction of the private label with A&P. I don't recall the exact date, but just prior to it.

Q. And where did this conversation take place? A. At the Kroger headquarter office in North Lake.

Q. North Lake, Illinois? A. In Chicago.

Q. And was there anyone present besides you and Mr. Blair? A. Not to my recollection.

Q. And would you please tell us in substance what was said at that time?

Mr. Curnin: Your Honor, at this time I would like to interpose an objection in regard to this conversation with Mr. Blair and the witness's testimony

as to the conversations he had with Borden personnel about offering * * *

* * * * *

[1082] * * *

At the same time that A&P makes objections such as they are now making, they insist that Complaint Counsel is under the burden to bring a cost study into this to show that the prices under this arrangement were not cost justified.

Now, Your Honor, Complaint Counsel, of course, deny that we have such burden. However, we believe that there is a great deal of evidence that has been and will be adduced in this record, much of which is based upon the internal considerations of the Borden Company which, taken as a whole, will indicate beyond a doubt that the price difference in this case could not be cost justified, and I believe that the internal considerations of the Borden Company in their dealings with A&P and others are very material to the counts involving A&P.

I believe also that A&P owes an apology in this matter to Counsel for both Borden and Complaint Counsel in connection with its prior accusations and I would like to note in connection therewith that Complaint Counsel had a great number of dealings with A&P Counsel during the course of the investigations in this matter in which Borden Counsel were not present and I don't believe that at that stage that it was appropriate for either of them to be present when we were making inquiry of the other party, and it certainly does not impute any misconduct on the part of either Complaint Counsel [1083] or the Borden Company.

Judge Hinkes: Well, let's not get involved in that issue. The only issue before me now is whether this

line of questioning concerning Borden's internal considerations for the establishment of its prices, both to A&P and to others, should be considered in connection with the charges that have been made in this Complaint against A&P.

Now, the only charge that Borden has to defend is Count III, in which both Respondents are charged with having acted to fix prices, maintain prices.

This, of course, involves at least a suggestion of an agreement or an understanding and they are both joined in this respect.

And to the extent that the internal considerations of one had any effect upon the arrangements that were concluded, if there were any, between the parties, to maintain prices, they would be pertinent in this proceeding.

Now, this evidence therefore has to be admitted. Whether they will affect A&P will depend upon the nature of the evidence that we have yet to hear concerning the arrangements that can be properly imputed to both Respondents to effect a maintenance of price and we haven't yet reached that bridge.

It is a question of which should come first in this case, the cart or the horse.

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[1088] We will wait and see. I am not going to rule it out at this stage.

You may continue.

(The witness re-entered the Courtroom.)

Judge Hinkes: The objection has been overruled. You may continue, Mr. White.

By Mr. White:

Q. Mr. Gose, just before you were excused, while Counsel took up certain objections before the Judge, I had asked

you to tell us the substance of your conversation with Mr. Blair at Kroger that you had just referred to.

Will you please do so? A. In substance I informed Mr. Blair that in the near future we would be packaging a private label product for one of our major customers.

I also requested the opportunity to, in the near future, present a private label program to him.

Q. What, if anything, did Mr. Blair say? A. As I recall, Mr. Blair was appreciative of the information I gave him and indicated at that first time that I visited him that it was something that could be discussed at a later date.

> Mr. Curnin: Your Honor, may we have the date of this conversation, the approximate time?
>
> The Witness: I could not give you the exact date [1089] but it was prior to our actually putting A&P's private label out on the street.

By Mr. White:

Q. In other words, assuming that that occurred on or about November 1, 1965, this conversation with Mr. Blair was shortly prior to that? A. Yes.

Q. All right.

Now, did you see Mr. Blair again? A. Later. I don't know the exact date.

Q. Would it have been in December of '65 or January of '66? A. I am sure it was in January, in early '66.

Q. And at this second conference with Mr. Blair, was there anyone present besides you and Mr. Blair? A. No one to my recollection.

Q. And where did this second conference take place? A. At the Kroger office in North Lake, Illinois.

Q. Will you please tell us the substance of that conversation? A. The substance of that conversation, Mr. Blair indicated that at that time they had absolutely no interest in a private label Kroger milk program in Chicago.

Testimony of Orville Gose

Q. How many stores approximately did Kroger have at that time in Chicago? [1090] A. Approximately 60-some.

Q. Now, was there any discussion at that time about the sale of Borden brand products to Kroger for the Chicago stores? A. Yes, I discussed the possibility of presenting a Borden program to Mr. Blair and he acknowledged that I could do so.

Q. Who was supplying Kroger for its Chicago stores with milk and milk products at that time? A. The Bowman Dairy Company.

Q. Now, did you subsequently submit a proposal to Mr. Blair for the Borden brand? A. Yes, I did.

Q. And about how long after this early January '66 meeting would this have taken place? A. I do not know the exact date but I would say in the first half of 1966.

Q. And can you tell me approximately the price level at which these prices were that you quoted on the Borden label?

Judge Hinkes: Of the Borden label?

Mr. White: On the Borden label, yes, sir.

The Witness: I do not recall the actual list prices in effect that time, but our discount, our top rebate at that time was 30 percent and as I recall this proposal was slightly better than what our discount was in existence because I do remember Mr. Malone giving recognition to the added volume, the effect of the added volume, that would be [1091] reflected in obtaining this business.

By Mr. White:

Q. Now, after you made this proposal to Mr. Blair, what, if anything, did he say in response to it?

Mr. Curnin: May I have that question read?

(The reporter read from her notes as requested.)

Mr. Curnin: Not to interrupt Mr. White's examination, may we note a continuing objection to these conversations?

Judge Hinkes: Very well. Your objection is noted.

Mr. White: Would you like the question read again?

The Witness: I thought I answered it but—

Mr. White: No, you didn't.

The Witness: —but if there is one pending, yes.

(The reporter read from her notes as requested.)

Judge Hinkes: That is the proposal on the Borden label; is that correct, Mr. White?

Mr. White: Yes, sir.

The Witness: At my next meeting with Mr. Blair Mr. Blair indicated that the quote that we made was over $100,000 excessive of their present cost for milk products.

[1092] *By Mr. White:*

Q. Now, when you say "over $100,000", did Mr. Blair explain that? Was that on an annuallized basis or did he simply say that? A. That was based on taking our price quotation as against their current volume levels as compared to the same volume levels with the price that they were currently paying.

Q. And this conversation where he told you this, was it shortly after you had made the submission of the Borden proposal on the Borden label to him? A. Yes, I remember that he got back to me quite soon after I had submitted the proposal to him.

Q. I think we have covered this but I want to make sure.

Going back to your meeting with Mr. Blair in January, do I correctly understand that at that meeting he told you that Kroger was not interested in a private label for its Chicago stores? A. That is correct.

Testimony of Orville Gose

Q. Mr. Gose, I hand you a document which has been marked RBX1-A through 1-J for identification.

(The document referred to as RBX1-A through 1-J was marked for identification.)

By Mr. White:

Q. Can you tell me what that document is, sir?

Mr. Mathias: Your Honor, I wonder if Complaint [1093] Counsel could be given the opportunity to read the document because it is the first we have seen it, prior to any question.

Judge Hinkes: Very well.

Just hold your question, if you will, Mr. White.

Mr. Mathias: Your Honor, we have had a chance to read it now.

Judge Hinkes: You may proceed.

By Mr. White:

Q. What is this document? A. This is a price proposal or a proposal for a private label milk program to Mr. A. L. Shough for their Chicago unit stores.

Q. And who is Mr. A. L. Shough? A. Mr. Shough was a gentleman who headed up the Dairy Department for the Kroger Company at the corporate office or at the headquarter office in Cincinnati.

Q. And was this proposal transmitted to Mr. Shough? A. Yes, it was.

Mr. White: I offer RBX1-A through 1-J, Your Honor.

Judge Hinkes: Is there any objection?

Mr. Mathias: No objection.

Mr. Curnin: Continuing objection for A&P, Your Honor.

Judge Hinkes: Very well. The objection is [1094] overruled and this document is received in evidence.

(The document heretofore marked RBX1-A through 1-J for identification was received into evidence.)

By Mr. White:

Q. Mr. Gose, was the offer covered by RBX1 accepted by Kroger? A. No, it was not.

Q. Mr. Gose, I show you what has been marked RBX2-A through 2-N.

(The document referred to as RBX2-A through 2-N was marked for identification.)

Mr. Mathias: Again, may we have a chance to read it before questions are asked?

Judge Hinkes: Very well.

Mr. Mathias: We have read it now, sir.

By Mr. White:

Q. Mr. Gose, what is RBX2? A. This is a proposal to Mr. Shough for private label milk program in Chicago.

Q. For the Kroger stores? A. For the Kroger Chicago unit.

* * * * *

[1100] * * *

Q. And was there anyone present at that conversation other than yourself and Mr. Gromer? A. Not to my recollection.

Q. What was the substance of that conversation? A. Mr. Gromer stated that our proposal was not sufficiently attractive for him to make a change in his milk products.

Q. And who was supplying the Gromer stores at that

time? A. To my recollection, it was the Dean Milk Products that were in the store.

Q. I take it that Borden did not secure the business of the Gromer Supermarkets based on this proposal? A. We did not secure the business.

Mr. White: I offer at this time RBX4-A through J, except for the handwriting appearing on Subpart H.

Mr. Mathias: No objection, Your Honor.

Mr. Curnin: Same objection, Your Honor.

Judge Hinkes: I will receive Respondent Borden's Exhibit 4 in evidence.

(The document heretofore marked RBX4-A through 4-J for identification was received into evidence.)

* * * * *

[1109] Q. This would have been a high-volume item? A. Yes, sir.

Judge Hinkes: Would you like to have a recess at this time?

Mr. White: Could we?

Judge Hinkes: Very well. We will take a short recess.

(A brief recess was held.)

Judge Hinkes: Mr. White?

Mr. White: Mr. Gose, I have shown you this afternoon five proposals submitted by Borden which you have identified.

Are these the only sales solicitations that were made during the period November 1, 1965 to the time you left the employ of Borden?

Mr. Mathias: Your Honor, I think that question is rather vague.

Judge Hinkes: In what way?

Mr. Mathias: Your Honor, sales solicitation—I don't understand the term "sales solicitation".

Mr. White: I will rephrase the question, if that will help.

Judge Hinkes: Very well.

By Mr. White:

Q. Aside from the five proposals you have identified, Mr. [1110] Gose, during the period November 1, 1965 until you left the employ of Borden near the end of 1968, did you and your sales staff solicit other wholesale customers in the Chicago area to sell them milk and milk products? A. Yes, sir.

Q. Were you doing this constantly? You and your staff? A. Yes; our sales people were constantly doing this.

Q. Mr. Gose, I show you what has been received in evidence as Commission Exhibit 138. A. Yes, sir.

Q. With respect to the Chicago metropolitan region to which that document relates, was Borden also allowing a central billing discount? A. Yes, sir.

Q. And how much was that? A. Two percent.

Q. And that continued on subsequent to January 1, 1966? A. Yes, sir.

Q. Until you left? A. Yes, sir.

* * * * *

[1120] * * *

Q. I believe you testified, Mr. Gose, that it was during the first half of 1966 that you submitted a quote on private label milk to Kroger, and specifically a Mr. Blair. A. Yes, sir.

Q. I may have misspoke myself, Mr. Gose. Let me state: was that proposal made on brand label, Borden brand

label, and not on private label? A. I am very sorry. Would you repeat the question?

Q. Was it your testimony that it was some time during the first half of 1966 that you submitted a quote on the Borden brand to Mr. Blair at Kroger? A. Yes, sir.

Q. And the price you quoted, was that better than the price that A&P was paying for Borden brand label milk at that time? A. I don't recall.

Q. What is your best recollection? A. It could have been.

> Mr. Mathias: Your Honor, I believe that answer is too speculative and I think it should be stricken.
>
> Judge Hinkes: You are saying it could have been and it could not have been? Is that what you mean?
>
> Mr. Curnin: Let me ask him a few questions, if I [1121] may, Your Honor.
>
> Judge Hinkes: I will strike the previous answer of the witness.

By Mr. Curnin:

Q. Did you have any discussions with anyone within the Borden Company about the quote that was to be submitted to Kroger on Borden brand label prior to your submitting it to Kroger during the first half of 1966? A. I am sure I did.

Q. You didn't prepare the quote? It was Mr. Malone who prepared the numbers, worked up the calculations? A. Yes.

Q. Do you remember discussing with Mr. Malone the fact that the price that was being offered to Kroger at this time was better than the price A&P was paying for Borden brand label milk? A. I don't recall any specific discussion with regard to that question.

Q. Do you have today a general recollection that the price in fact was better than A&P was paying?

Mr. Mathias: Your Honor, I object. The witness has already stated he did not have any such recollection.

Mr. Curnin: I don't believe that is his testimony, Your Honor and I believe I have a right to probe this point.

[1122] Judge Hinkes: Let's have the witness' last answer read.

(The reporter read from her notes as requested.)

Mr. Curnin: Although he may not recall a specific discussion, Your Honor, he may nevertheless have a general recollection on the subject and that is what I am asking him about now.

Judge Hinkes: I will allow it.

You may answer.

The Witness: As I recall, Mr. Malone gave recognition to the additional volume that would be obtained if we were to secure the Kroger business and I do recall that recognition was given to that in the proposal that was prepared for Kroger.

By Mr. Curnin:

Q. And by doing so he developed a better price for Kroger on Borden brand label than A&P was then paying? A. Yes, sir.

Q. You testified, sir, that Mr. Blair informed you that in words of substance he wasn't going to accept your proposal because it was $100,000 in excess of what they were then paying Dean for its brand label milk—or was it Bowman, sir? A. I don't recall anything other than more than he was currently paying.

Q. More than he was currently paying to whom? [1123] A. I don't recall that he said.

Q. Do you know what dairy was supplying Kroger during the first half of 1966? A. To my recollection it was the Bowman Dairy Company.

Q. And that figure of $100,000, was that an annual figure? A. That was on an annualized basis.

Q. Did you offer to reduce your price that you had quoted to Kroger when Mr. Blair told you this? A. I do not recall ever doing anything like that.

Q. Now, during this period, 1966, the first half of 1966, you were in contact with representatives of the A&P Company? A. Yes, sir.

Q. As a result of your conversation with Mr. Blair, did you ever disclose to anyone at A&P at least in regard to one supplier and one competitor that the price you were charging was not competitive and that therefore you would reduce the price being charged A&P on brand label milk? A. No.

Q. There has been marked as RBX1 the July 29, 1968 proposal which was made to the Kroger Company which you, I believe, have testified was not accepted by Kroger.

Judge Hinkes: What date did he mention?

Mr. Curnin: July 29, 1968, Your Honor.

Mr. White: Would you like to see it?

[1124] The Witness: If it is permissible, Your Honor.

Mr. Curnin: If, during the course of my questioning, Mr. Gose, you wish to refer to any document that has been marked in evidence, please let me know.

The Witness: Could you restate your question, sir?

Mr. Curnin: Will you read the question back, please?

(The reporter read from her notes as requested.)

Testimony of Orville Gose

By Mr. Curnin:

Q. Is that correct, Mr. Gose? A. That is correct.

Q. Did you have a discussion with Kroger at which they told you the reasons why they were not accepting this proposal of July 29, 1968? A. There was a discussion and as I recall Mr. Shough indicated that certain products because of his knowledge of the milk production business that looked unreasonably high to him.

Q. Were these products homogenized milk products? Or the byproducts? A. I don't remember them specifically but they were very definitely in the byproducts category.

Q. Was he saying to you in words of substance then that your price is all right on the homogenized milk but it is too high on the byproducts? [1125] A. Would that be a hypothetical question that I can't answer?

Q. No, I hope it is a factual question that you can answer.

Would you repeat the question, please?

(The reporter read from her notes as requested.)

The Witness: It could be assumed.

By Mr. Curnin:

Q. And what—

Judge Hinkes: Just a moment. What could be assumed?

By Mr. Curnin:

Q. Was that your understanding of what this gentleman from Kroger was saying to you? A. I would like to repeat that the byproducts he indicated were unrealistically high.

Q. Unrealistically high, did you say, sir?

Judge Hinkes: Did he offer any objections to the price for homogenized milk?

The Witness: He did not at that time.

By Mr. Curnin:

Q. But he raised objections to the price you were quoting on the byproducts because in his opinion they were unreasonably high? A. They were too high.

[1126] Q. And was Kroger buying supplied by Dean at this time? A. Yes, they were.

Q. To the best of your knowledge, Mr. Gose, was the price that is quoted in RBX1 for private label, was that price comparable to what A&P was paying for private label at this time in July of 1968? A. I would say it was comparable.

Q. Now, after your discussion with the Kroger representative and some months thereafter, you submitted to them a second proposal dated October 24, 1968, which has been marked here as RBX2-A, which I now show you.

Did Borden in that quote improve the price on private label milk and byproducts from that which appeared in RBX1 on the byproducts in light of Kroger's statement to you that they were too high?

Let me give you two examples, Mr. Gose, and this might speed things up for us.

I direct your attention to RBX1, page C, and the item "cottage cheese" in both the 16 and 32 ounces, and at the same time I direct your attention to RBX2, page H.

Do you have those pages, sir? A. I am not with you, sir.

Q. Mr. Gose, as you look at these exhibits, is it true that RBH1, page C, which I directed you to, and RBX2, page J, have different delivery requirements? [1127] One is five-day and one is six-day. A. Yes, sir.

Q. So that in that sense they would not be totally com-

parable; is that correct? A. It would be very difficult to compare the two schedules because of that reason.

Q. Was it your understanding in submitting to Kroger RBX2, to lower the price on the byproducts so as to overcome the objection that they had raised at the time you submitted RBX1 back in July? A. As I recall that adjustment was made.

Q. I note that RBX2, which is the October '68 quote to Kroger, affords them two pricing schedules or affords them an option.

One is a price based upon Borden dock pick-up, which I assume that they pick the product up at Borden's Woodstock, Illinois plant and the other is a more conventional drop delivery to the stores; is that not so? A. That is true.

Q. Was A&P offered a similar option at this time in October of 1968?

In other words, so they could have a private label price, one based on dropped shipment, or if they so chose, one based on dock pick-up? A. To my recollection, they were not.

[1128] Q. And had they been, would there have been a substantial saving in the cost, at least in the wholesale price?

Do you understand that question, Mr. Gose? A. I am not sure that I understand it.

Q. I withdraw it.

The figures are in the exhibit.

Did Borden undertake a cost study at the time and prior to its submission of RBX2 to Kroger, to your knowledge? A. I cannot answer that question.

Q. Is it that you don't know, sir, or you don't now recall? A. I don't recall.

Q. So then you don't know whether or not the price that was offered to Kroger in fact encompasses all the cost savings that may have been available to a customer such as Kroger at this time? A. I could not answer that.

Q. Is it your testimony, Mr. Gose, that you were unsuccessful in selling private label to Kroger even with the quote which you gave them in October of '68, RBX2? A. That is correct. To my knowledge, the business was not secured.

Q. Do you know why? A. I do not know why.

Q. And did White Hen Pantry reject the private label [1129] proposal which you submitted to them in March of '68, which proposal has been marked as RBX3? A. Yes, they did.

Q. And the price that was offered to White Hen Pantry for private label on the half-gallon, was that comparable to the price A&P was paying at that time? A. I don't recall.

Q. Why did they reject your proposal here on private label?

Judge Hinkes: If you know.

By Mr. Curnin:

Q. If you know, sir. A. I do not know.

Q. Did anyone report to you—Mr. Dischner or anyone else in the Borden organization—that the price was rejected because it was too high or that White Hen Pantry didn't think savings permitted switching to private label?

Mr. Mathias: Your Honor, which question is he asking the witness?

Mr. Curnin: I will ask them one at a time, Your Honor.

By Mr. Curnin:

Q. Were you informed by Mr. Dischner or any other representative of the Borden Company that White Hen Pantry had rejected this offer because the price was too high? A. I don't recall.

[1130] Q. You don't recall being informed of the reason why they rejected the offer? A. That is correct.

Q. And the Borden Company was unsuccessful in its private label quote to Gromer Fine Foods, which has been identified as RBX4; is that not so? A. That is correct, sir.

Q. Did they actually tell you why they rejected this proposal? A. Yes, sir.

Q. What did they tell you? A. The prices were not sufficiently attractive to warrant making a change.

Q. And to your knowledge was the price quoted to Gromer on half gallon private label comparable to what A&P was paying at this time? A. I could not answer that.

Q. Was Dean supplying Gromer at this time? A. The Dean product was in the Gromer stores at that time.

Q. How many stores did Mr. Gromer have? A. As I recall, approximately five stores.

Q. In September of '68 you testified you submitted a private label proposal to Eagle and that proposal has been identified as RBX5 and that this proposal was accepted by Eagle.

[1131] Was the price quoted on private label to Eagle comparable to that which A&P was paying at this time for private label?

Judge Hinkes: Private label?

Mr. Curnin: Private label.

The Witness: I would say that the price was comparable.

Judge Hinkes: Is that for the Borden label milk that you were quoting your price to Eagle?

Mr. Curnin: No, Your Honor. This is on private label.

The Witness: It was on private label, Your Honor.

Mr. Curnin: May we go off the record, Your Honor?

Judge Curnin: Off the record.

(Discussion off the record.)

Judge Hinkes: Let's go back, again.

The proposal that White Hen rejected, was that on private label or on the Borden label?

Mr. White: May he see the document? It is all in evidence, Your Honor.

Judge Hinkes: Oh. I guess, then, I don't have to trouble the witness.

Mr. Curnin: That is RBX3, Your Honor.

Judge Hinkes: Very well.

* * * * *

[1150] * * *

Judge Hinkes: Well, this witness is being asked for his understanding, which may not be at all similar to the terms of the contract, and to that extent it is permissible, although what its probative value would be, I don't know.

You may answer the question.

The Witness: My recollection of the terms were that there would be advance ordering, frequency of deliveries, varied with the various areas involved, there would be no credit for returns, unless it was due to faulty manufacturing by the Borden company, there was advance orders, such things as no stamping of the milk and so forth. That is my recollection.

By Mr. Curnin:

Q. And that this represented a change in the manner and method in which Borden had been delivering Borden label milk to A&P stores. A. Yes, I think it definitely changed a number of the conditions of delivery.

Q. And was one of the conditions, Mr. Gose, that the

milk was to be delivered to a cooler but was not to be placed in the dairy case? A. That is my recollection.

Q. Now, was it necessary for the Borden Company to instruct its personnel on this new manner and method of delivery? A. As my memory serves me, that was covered with our various [1151] branch operating people and in turn it was their responsibility to cover it with the delivery people involved at the respective branches.

Q. Were specific instructions issued by Borden to its branch people as to the instructions that were to be given to its drivers? A. Yes. As I recall—I can't remember dates, obviously—but as I recall, we at our office had meetings with each branch operating manager and I am sure some of his personnel.

Q. For the purpose of instructing him on the new terms and methods of delivery. A. The conditions and terms of the new program.

Q. To your knowledge, did Borden ever permit or encourage its drivers or distributors to vary from these terms and conditions of delivery? A. Absolutely not.

Q. Now, were you ever advised of an instance or an occasion when a Borden driver was doing more for a particular A&P store or its manager in regard to the delivery of private label milk? A. Yes, I remember one occasion where this information reached my desk. I recall seeing Mr. Elmer Schmidt with regard to it, and I recall that it was with regard to one of our deliverymen that was doing the ordering rather than the store personnel, and I recall Mr. Schmidt picking up the phone almost immediately, discussing the matter at the store level with [1152] whoever was involved, and if my memory serves me, the problem was corrected almost immediately. That, for some reason, is quite vivid in my memory.

Q. When did this occur, sir, as best you can recall? A. I have no idea as to when that was.

Q. During the period 1966 through the end of 1968 when

you left, was this the only occurence that you can recall? A. It is the only one that I can recall, that I can think of.

Q. And were you the Borden employee who was responsible for the supervising of the manner and method of delivery and if there had been any complaints along these lines, you were the man who would have been apprized of it? A. Yes, I should have been apprized of it because I was the one, either myself or possibly Gordon Tarr, that would have discussed such a matter with Mr. Elmer Schmidt.

Q. If a Borden driver or distributor deviated from the instructions, he had received from the Borden Company as to the manner and method of delivery, he would have been doing so then, in your opinion, in direct contravention of instructions he had received from the Borden company? A. Yes.

Q. Did you consider Elmer Schmidt a knowledgeable milk buyer? A. I would have considered him a capable buyer, if this is answering your question. I wouldn't consider Mr. Schmidt as being overly knowledgeable with regard to the milk industry, the [1153] dairy industry.

Q. Well, when you first came in contact with Mr. Schmidt, and I believe you testified this was sometime after November 1, 1965, at which time you started as the contact man, so to speak, between Borden and A&P, at that period of time, the latter part of 1965, did you conclude that Mr. Schmidt had a great lack of knowledge about the dairy industry. A. I don't know that I concluded that. I think it was awareness or a feeling on my part.

Q. And did others at the Borden Company have the same feeling at this time, November of 1965?

Mr. Mathias: Your Honor, I object to the form of the question.

Mr. Curnin: I withdraw the question.

Testimony of Orville Gose

By Mr. Curnin:

Q. Did you have discussions with others at the Borden company in November of 1965 at which you discussed Mr. Elmer Schmidt and his knowledge of the dairy industry? A. I did not, to my knowledge.

Q. Did Mr. Schmidt in November of 1965, based upon conversations that you had with him, understand such things as the Federal Milk Marketing Order? A. Your date, I could not answer. I do remember an occasion when the gentleman that was in charge of our production and responsible for the Woodstock plant made a call with me to see * * *

* * * * *

[1192] * * *

Judge Hinkes: The White Hen proposal, around March of 1968?

The Witness: I believe so.

Judge Hinkes: And the Kroger proposal in July and October of 1968?

The Witness: The Kroger, sir?

Judge Hinkes: Yes.

The Witness: Yes, sir.

Judge Hinkes: Now, the Kroger proposals were on private label at that time; is that right?

The Witness: Yes, sir.

Judge Hinkes: What was the proposal that you talked with them about in 1965 before the A&P deal went through?

I believe you testified that you spoke to Mr. Blair and that was about private label, was it not?

The Witness: As I recall.

Judge Hinkes: Telling him of your intentions to go ahead with the private label business?

The Witness: Yes, sir.

Judge Hinkes: And if I am correct you testified that Mr. Blair said, "not now; maybe later," or words to that effect?

The Witness: Yes, sir.

[1193] Judge Hinkes: You approached him then later and if my notes again are correct it was in early 1966?

The Witness: Yes, sir.

Judge Hinkes: And at that time you again broached him on the subject of private label milk; is that correct?

The Witness: Yes, sir.

Judge Hinkes: And once again he said he wasn't interested?

The Witness: That is correct, sir.

Judge Hinkes: Now, then, after that you proposed a price on Borden label milk; is that correct?

The Witness: That is correct, sir.

Judge Hinkes: How much after that? That is, how much after your early 1966 suggestion of private label?

The Witness: Shortly thereafter, sir, to my recollection.

Judge Hinkes: A matter of months or weeks you mean?

The Witness: I would be inclined to think a matter of weeks.

Judge Hinkes: And this proposal was on a price to Kroger for Borden label milk that would have a better than 30 percent rebate from list?

The Witness: Yes, sir.

Judge Hinkes: And how did that compare, if you know, [1194] with the A&P Borden label milk price?

The Witness: I don't recall, sir.

Judge Hinkes: You don't know whether that better than 30 percent rebate was lower or higher than

A&P was paying for Borden label milk; is that what you are saying?

The Witness: I don't know for certain. It is possible that it could have.

Judge Hinkes: Could have been either lower or higher?

The Witness: It could have been lower.

Judge Hinkes: It could have been lower than A&P's price?

The Witness: Yes, sir.

Judge Hinkes: Nevertheless, Kroger turned it down; is that it?

The Witness: That is correct, sir.

Judge Hinkes: And it was then that they said that the price is $100,000 too high or something to that effect?

The Witness: Yes, over $100,000.

Judge Hinkes: Is there anything else, gentlemen?

If not, thank you, Mr. Gose. You may step down. You are excused.

(Witness excused.)

• • • • •

Testimony of Harry Archer

June 25, 1973

* * * * *

[1247] your presence ever discuss with any A & P Representative the price at which A & P intended to, or would, or should sell private label products out-of-store in the Chicago area? A. No, sir, never.

Q. Was there ever any discussion during that time period, either in your presence, or as far as you know, concerning the price at which A & P would sell Borden label products out-of-store in the Chicago area? A. No, sir.

Q. Again, using the fall of 1964 as a reference point, Mr. Archer, did you or did any Borden Representative in your presence ever discuss with A & P the fact that Borden would not or did not intend to pass on at the wholesale level to customers, other than A & P price reductions, similar to the reductions granted to A & P? A. Would you repeat that question so that I can understand it?

(The record was read by the reporter as follows:

> "Question: Again, using the fall of 1964 as a reference point, Mr. Archer, did you or did any Borden Representative in your presence ever discuss with A & P the fact that Borden would not or did not intend to pass on at the wholesale level to customers, other than A & P price reductions, similar to the reductions granted to A & P?")

The Witness: The answer is no.

[1248] Mr. White: That is all, Your Honor.

Judge Hinkes: Mr. McInerney.

By Mr. Inerney:

Q. Mr. Archer, I believe you told us that you had a number of contacts with Herschel Smith with respect to selling Borden products to A & P in various parts of the

country at various times, is that correct? A. Yes, that is right.

Q. To the best of your knowledge, apart from whatever may have happened in Chicago, can you recall any situation, with the possible exception of Chicago, in which A & P gave Borden an opportunity to rebid or resubmit a price to A & P after A & P had received competitive offers? A. No.

Q. Insofar as you are aware, would A & P expect Borden to quote its best price the first time, and in other words, not give Borden—

> Mr. Soeffing: Your Honor, I will object to that question. He said "would expect." I think that is asking the witness to make a guess. I think he should ask him what the practice was.
>
> Mr. McInerney: I am talking about a course of dealings.
>
> Judge Hinkes: Ask him with respect to a course of dealings. Ask him what the practice or policy was, or something [1249] of that sort.

By Mr. McInerney:

Q. In general, wasn't it the practice of A & P that Borden would only be able to submit one price and would not get a second bite at the apple if that price was not a competitive one? A. Yes, I think you are right. Please keep in mind though that you are asking—I would have to withdraw my answer. You are speaking of two different levels of responsibility, and this—at the New York level, we just didn't have that type of conversation, so that any response to your direct question that I give you would have to be at our local level, and I could only deal with the policy that we have in our own company.

Q. I am just asking you as a general matter and as

matter of practice, Mr. Archer, wasn't this generally A & P's practice? A. Yes, that is right.

Q. And insofar as you are aware, with the possible exception of Chicago, that was regularly followed? A. That is right.

Q. You did have some discussion with Mr. Herschel Smith—correct me if I am wrong—with respect to private label milk in New York prior to the advent of this Chicago negotiation? A. Yes, indirectly.

Q. Do you recall that Borden made an offer for private label milk to A & P for the New York area? [1250] A. Yes, I know that it was made.

Q. And do you recall that the price quoted in New York was based on the price of raw milk plus container costs, processing charges, and delivery charges? A. I am not aware of the detail on it.

Q. In the hope of refreshing your recollection, although the document has been admitted in evidence, I would like to show you Commission Exhibit 23-A, the bottom of the page, and I would like to ask you to read a paragraph commencing "examination of similar costs in Metropolitan New York."

If you would just read that one paragraph down to the end of the quotation.

My question is, sir, whether reading that helps to refresh your recollection that there were prices quoted in New York based on the price of raw milk plus a container cost, processing charge, and delivery charge? A. No, it really doesn't.

Q. Do you know in general what the spread between the price of raw milk and the price that Borden charged A & P for the private label milk in New York was? A. No, I am not familiar with that figure.

Q. Do you know whether the price of raw milk in New York was lower or higher than in Chicago in 1964 and 1965? A. I can't tell you that.

Testimony of Harry Archer

Q. With respect to the private label offer in Chicago, did you [1251] or did anyone in your presence tell Mr. Smith or anyone from A & P that the private label prices being offered to A & P in Chicago were not cost justified? A. I am not aware of that.

Q. Did you or did anyone in your presence tell Herschel Smith or anyone from A & P that the private label prices being offered to A & P in Chicago would not be made available to others on proportionately equal terms? A. I am not aware of that.

Q. Do you recall discussing the subject of availability of those prices to others with Herschel Smith? A. Never.

Q. Do you recall a discussion with Mr. Smith concerning the final quotation that was submitted to A & P in early October, 1965? I believe the record shows the date is approximately October 1, 1965. A. I had no conversation with Herschel Smith with reference to that.

Q. Without pinpointing the specific date, sir, do you recall any conversation with him at around that time, perhaps after that time, with respect to this private label quotation in Chicago? A. No, no, I do not.

Q. Do you believe that Herschel Smith or anyone from A & P misrepresented anything to you, or to anyone from Borden during [1252] these negotiations for private label milk in Chicago? A. I can only answer a portion of your question. I can say with all candor and honesty that Mr. Smith never did to me. It would be just pure conjecture on my part to answer the latter part of this question.

Q. I am only asking you all of these questions, sir, insofar as you are aware. A. All right. I am not aware.

Q. Do you know whether Borden made private label milk offers to other customers in Chicago, other than A & P, in 1964 or thereafter? A. I believe the record will show that they did.

Q. And were the prices quoted to the other private label

customers similar to those quoted to A & P? A. I am not aware of that.

Q. You have no knowledge either way? A. No.

Q. Sir, you have been shown a number of notes which you identified as being in the handwriting of Mr. Pentz, and which appear to be from the desk pad of Mr. Pentz. As to several of them, you said that was the first time you had ever seen them. My question is, do you recall having seen any of those handwritten notes before? A. No, I don't, unless my initials appeared on them. If you would go back over them and find my initials there, I would have [1253] to agree that I had some knowledge of it in passing at the time, but if my initials did not appear there, I would have to say that I did not recall ever seeing any of them.

Q. As a general practice, unless your initials appeared as a recipient of the note, is that the idea? A. That is what I am trying to say.

Q. In other words, the fact that Mr. Pentz may have written a note—I don't have it in front of me—that H.A. did something with H.S., that would not be an example of where you might have seen the note? A. That is right.

Q. Apart from the instance you have described, would you have any independent recollection of having received any of these notes? A. Yes, I think I so testified that I did see several of these notes when they were shown me.

Q. I was trying to do this en masse, but as I recall, the one that you said that of was a typewritten memorandum on which you had written the word "agreed" or some such thing. A. That is right, "agreed" and "good."

Q. Is that the one that you are speaking of? A. That is it.

Q. Are there any others that you can recall? A. Not that I recall.

Q. Is it possible that on the ones where your initials may [1254] appear and have been crossed out, that Mr. Pentz was writing to himself—

Mr. Soeffing: I am going to object to that, Your Honor. He said "is it possible?" I think we should find out what the usual course of practice is, not is it possible.

Judge Hinkes: I would have to sustain that objection. The answer would not have any probative value, because I think everything is possible.

By Mr. McInerney:

Q. Mr. Archer, were any of the handwritten notes that we are speaking of, which are entirely handwritten notes from the calendar pad of Mr. Pentz apparently, did you instruct Mr. Pentz to prepare any of those? A. No, I did not.

Q. Mr. Archer, I would like to show you two letters dated October 1, 1965, which have been marked respectively RA and PX-2 and RA and PX-3. Would you please look at those? A. Does this mean this was attached?

Q. Yes, it has been testified. A. I have never seen that before.

Q. You have never seen RA and PX-2, which is apparently a letter from Mr. Tarr to Mr. Schmidt, is that correct? A. Yes, this would appear so.

Q. But is it your testimony that you haven't seen it before? A. That is right, I have not seen it before.

[1255] Q. Have you seen similar letters, letters similar to that? A. I have not.

Q. When A & P would receive a price quotation from Borden, can you tell us whether it was a practice for Borden to give A & P some kind of a letter of assurance as to the legality of the prices that Borden was offering A & P? A. Yes, I believe that it was, and I think that it was so written or typed on the proposal. I believe that I am correct in that.

Q. And is the kind of assurance that you were just

speaking of an assurance similar to that contained in RA and PX-2? A. I can't testify—

> Mr. Soeffing: Your Honor, I must object to that. He has already testified he has never seen these letters before quite emphatically.
>
> Judge Hinkes: I will overrule the objection. Let the witness answer. Is the assurance the same type that this letter—
>
> Mr. McInerney: Or similar, Your Honor.
>
> The Witness: Yes, I think I would respond in the affirmative to that. I presume that there were some instances of State laws that would change the wording in some fashion, but I am not sure of that either.

By Mr. McInerney:

Q. Did you ever advise Mr. Smith that Borden's private label [1256] quotation in Chicago was made for the purpose of meeting competition and would not be made available to others? A. I never did that.

Q. Did you ever have a discussion with Mr. Smith about the Woodstock plant, the new plant that Borden had constructed in Woodstock, Illinois? A. I don't recall specifically, but that Woodstock plant was, of course, a matter of record and a part of very prominent news in the dairy magazines, and so forth, and so forth, and Herschel was interested in that sort of thing, because they were thinking of some processing plants of their own; so conceivably yes, but to the best of my knowledge, no.

Q. In 1964 and 1965, they did not have any processing plants of their own, is that correct? A. The Tea Company?

Q. Yes. A. You are speaking of milk? They had an ice cream plant in Wisconsin, but no milk to my knowledge. No, I don't believe so.

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Testimony of John Szczepaniak

June 26, 1973

* * * * *

[1280] * * *

Q. Did you have any supervisory control over these routes, sir, as route foreman? A. No; there was another foreman above me, the regular wholesale foreman, plus there was a man above him also.

Q. Well, were you familiar, in this position, with the various wholesale routes in a general way? A. Yes.

Q. And were you familiar with the major customers located on the various wholesale routes served out of the Hammond branch? A. I wasn't at the beginning, but gradually I learned the different routes over a time span or a period of time; by running special deliveries to this one and that one, I would learn where the stores were and everything.

Q. Were you familiar with the procedures, the delivery procedures, in effect on these various routes? A. If I was to run a route, I would go with the driver and he would show me where the stores were, what door he would stop at, and who he would see and where he would leave the milk, and so on.

Q. Now, as an assistant route foreman, starting in, I believe you said, 1963, what were your duties at this point, sir?

> Mr. Schaefer: Your Honor, if I may interject, I don't think it was 1963 when Mr. Szczepaniak said he started as assistant route foreman. I am not sure about that date.

* * * * *

[1286] Q. (Continuing) Are you familiar with this document Mr. Szczepaniak? A. No.

Q. Are you familiar with the terms of service outlined in that document, sir? A. You mean the delivery setup?

Q. Yes. A. The delivery setup I would be familiar with.

Q. Does this document describe the terms of service and delivery which were in effect in the Hammond area and Gary area in 1966, sir, and later periods? A. In reference to what, sir?

Q. In reference to the general terms of service. A. Deliveries, you mean?

Q. Yes, the delivery-service terms that are outlined therein. A. They were served six days a week.

Q. Was there any requirement, sir, that they had to be served six days a week? A. Yes.

Q. What was this requirement, sir? A. Our union contract, sir, requires six-day delivery.

Q. So that you were not able to give any lesser-number days delivery to any particular customer? A. No less than four, the contract stated.

Q. And what is the six-day week, then? What was the [1287] requirement in this regard? A. Six days delivery —six days a week.

Q. Were all of the large supermarket chains served six days a week? A. All stops was.

Mr. Schaefer: Can we have a time period on that again, your Honor?

Mr. Mathias: I used the term "1966."

By Mr. Mathias:

Q. This answer would have pertained to the time period 1966. Would this condition have continued following the year 1966? A. Yes.

Mr. Dembrow: Excuse me. What condition are we talking about?

Mr. Mathias: The six-day delivery.

Mr. Dembrow: Thank you.

Testimony of John Szczepaniak

By Mr. Mathias:

Q. The six-day delivery requirement continued after 1966? A. Yes.

Q. And was it also in effect in 1965, sir? A. I am sure it was. The best I can remember, we always delivered six days a week—the routes went out.

Q. Now, was there any time in later years when this circumstance changed, when delivery was made on a less-than-six-day-per-week basis? [1288] A. Not that I delivered.

Judge Hinkes: Let me understand. You say that this was a six-day delivery program but that the union contract only provided not fewer than four?

The Witness: Six days, no less than four.

Judge Hinkes: So, if I understand it, the union contract would permit as few as four-day delivery program but the practice was a six-day, is that it?

The Witness: Right, sir. They all had six-day delivery.

Judge Hinkes: Very well.

By Mr. Mathias:

Q. Now, in connection with sales to the supermarkets, both chain and independent, how were deliveries at the store level generally handled?

Mr. Dembrow: Excuse me. Are we talking about all supermarkets?

Mr. Mathias: Your Honor, I would prefer my question to be answered. I would rather not be interrupted by A and P counsel.

Judge Hinkes: Yes; I don't think we should engage in these questions between counsel. If there is an objection, state it in the acceptable form and I

will rule, but otherwise let us have the question and go on. You will have your opportunity to explore the matter further to your heart's content on [1289] cross examination.

Mr. Mathias: Would the reporter read the question.

(The reporter read the pending question.)

The Witness: What do you mean—"how were they handled"?

By Mr. Mathias:

Q. How was the delivery made in general? A. Well, to the cooler.

Q. And this would be true in the case of delivery to an A and P store? A. Right.

Q. Would it be true in the case of Burger's Market? A. Right.

Q. Would it have been true in the case of the Joseph Tittle and Son stores? A. Right, sir.

Q. Would it have been true in the case of Model Food Center? A. Right.

Q. Would it have been true in the case of Wilco Food Center? A. Yes.

Q. Would this have been true in the case of Wallies Market? A. Yes.

Q. And would it have been true in the case of South Town Market? A. No; South Town, we used to service the case.

[1290] Q. What do you mean by "service the case"? A. They had no backup facilities other than maybe one or two extra cases of milk, so, consequently, what milk we brought in, we would bring in no more than what would fit in the case, and the driver would do this.

Q. And this was a different service than you performed for the other customers I mentioned? A. Yes.

Q. What about Dick's Market? Did you deliver to a cooler there? A. The case there was also serviced by the driver. He had a little more backup room, so we left a little extra in there, too.

Q. So in the case of Dick's Market and South Town, an extra service was performed that was not performed for the others? A. Yes.

Q. Now, did the Borden Company, during this period, 1966 and following, have a policy concerning preordering of products and advance orders? A. The A and P used to give us advance orders.

Q. Did any of the other markets which I have mentioned provide you with advance orders, sir? A. No, sir.

Q. During this period, 1966 and following, did the Borden routes in the Hammond area have any provision concerning the [1291] return of products? A. The only products that we were allowed to pick up were damaged merchandise and sour merchandise in date.

Q. What do you mean by "in date," Mr. Szczepaniak? A. Where the date has not yet expired.

Q. This would be the normal shelf life of the products? A. Right.

Q. So that if the product were spoiled before the time when it was scheduled, the lowest shelf life, well, then you would take the return? A. Send it to the lab for analysis.

Q. Now, was this policy in effect for all of the customers we have named previously? A. Yes.

Q. Do you recall a time when the Borden routes would accept returns on any products? A. They might have done this years ago prior to my getting involved with it, but I personally have no knowledge of it.

Q. So all the time that you were associated with the wholesale routes in the Hammond area, the policy on returns which you have described was in effect? A. As far as I personally can tell you what I personally had been involved with, yes.

Testimony of John Szczepaniak

Q. And was this the Borden Company policy? A. Except damaged merchandise and merchandise bad in date.

[1292] Q. So that, in taking this position you were following the orders of your superiors in the Borden Company? A. That is what way it was told to me to do.

Q. Now, Mr. Szczepaniak, you mentioned, I believe, that at some times you drove the routes for special deliveries, is that correct sir? A. Right.

Q. Now, in the year 1966 and following, did Borden's Hammond branch have any policy concerning the frequency and necessity for special deliveries? A. Frequency or necessity?

Q. Were special deliveries made as a general rule? A. If a store called up and they needed extra milk and we had it, I would take it to them.

Q. Was this a very common occurrence, Mr. Szczepaniak? A. Nothing of any regular nature. You never knew.

Q. In the case of the scheduling of your route, was the route arranged so that the stops at the various stores would be made at the time most convenient to the Borden driver? A. The drivers set up their stops by their areas that they serve. We had one route in the Hammond, East Chicago area, and we had another one in the Gary area in the south and another one east of that. The drivers scheduled the stops the most efficient way possible for themselves so they wouldn't be backtracking and this and that.

[1293] Q. Mr. Szczepaniak, during the period 1965 and 1966, what was the method of payment of the drivers in the Hammond branch area? Were they paid on an hourly-wage or commission basis or just what was the method of payment? A. Weekly rate plus commission.

Q. And what portion of their pay would the commission be, approximately? A. Depending on the number of points they run through the month.

Q. The commission would vary in accordance with the number of— A. Sales.

Q. Would the commission be a major portion of their salary in most instances, Mr. Szczepaniak? A. The bigger routes would receive more than the smaller routes.

Mr. Mathias: Your Honor, I have only a couple of more questions of this witness. Then I would like to try to identify a few exhibits through him, and I think if we would take a brief recess at this point where we could line those up, it would expedite things.

Judge Hinkes: Very well. We will take a short recess at this time.

(A short recess was taken.)

[1294] Judge Hinkes: You may continue, Mr. Mathias.

By Mr. Mathias:

Q. Mr. Szczepaniak, you mentioned that in the case of the A&P stores there was a pre-ordering of the product. In the case of the other stores such as Burger and Title stores, how was the ordering handled in those cases? A. By the driver himself. He had what we would call a buildup of each product in his book, a daily buildup and he would built the product up through that.

Q. In other words, he knew the approximate level that each— A. Of sales.

Q. Of sales that each store required? A. Right.

Q. And how would he determine then how much was needed in a particular store? A. By the buildup in his book from prior deliveries.

Q. He would check to see what was on hand, check against his book and what difference was required? A. Right.

Q. Now there was also a mention of some discussion of special deliveries. Did A&P stores in the Hammond area

ever get special deliveries after the private label program went into effect? A. Yes.

* * * * *

[1308] * * *

By Mr. Dembrow:

Q. Mr. Szczepaniak, you stated, I believe, in your direct testimony that you became involved with the wholesale routes in the Gary Hammond area around August of 1965 after you had been on country routes for a while. A. That is right.

Q. And in this connection you served A&P stores in the vicinity described, is that correct? A. At no regular basis. I had no route.

Q. Right, but from time to time you served A&P stores? A. Yes, if a need arose.

Q. And I believe you stated you remember serving A&P stores when they were receiving private label milk. A. Yes.

Q. Do you recall ever serving any A&P stores in this area when they were not receiving private label milk? A. Not that I can really remember. It has been so long.

Q. I believe, Mr. Szczepaniak, that you stated that among the stores you served only the A&P stores pre-ordered. Is this correct? A. That is right.

Q. And during the occasions when you actually delivered to the A&P stores were the orders ready for you when you arrived [1309] at the store? A. Whenever I was on a route, yes.

Q. In regard to the other stores, stores other than A&P, I believe you stated it was necessary for the driver to complete the order when he delivered to these stores. A. That is right. He would make up an order.

Q. In connection with this making up of the order by the driver, was it necessary for him to go into the store to check the stock, the products that were in the display case? A. As a count.

Testimony of John Szczepaniak

Q. Mr. Szczepaniak, during the occasions that you delivered to these stores, did you furnish the stores other than A&P stores with promotional material, signs and various other paper type material? A. The independents I know for a fact—I remember distinctly—whenever they had a sale on it was available to them if they wanted it.

Judge Hinkes: What was available to them?
The Witness: The signs, the sales signs, sir.

By Mr. Dembrow:

Q. Did you furnish this type of promotional material and signs to the A&P stores? As best you recall? A. I can't really recall whether or not it was.

* * * * *

Testimony of Herschel Smith

June 27, 1973

* * * * *

[1350] * * *

Q. I believe there came a time when A & P initiated a private label brand in the New York area? A. Yes, sir.

Q. When was that? A. It started in November, 1964, in the New York area in the New York side of the Metropolitan area.

Q. And was this a project of your office? A. Yes, sir.

Q. In 1964, after you had taken over the national purchasing of milk, did you suggest to anyone else that they explore private label? A. Yes, I did.

Q. How did you do that? A. In late 1964, there was a meeting at Headquarters of the seven Purchasing Directors. They were the seven Divisional Purchasing Directors.

Q. For dairy products? A. They were the Purchasing Directors of the Divisions. Do you understand?

Q. Yes. A. They were brought to New York, not for this purpose, but for a meeting of Purchasing Directors and this just accidentally coincided with the introduction of A & P brand milk in the New York market. While they were in New York, this [1351] project was shown to them.

They were made familiar with the fact that A & P had just changed to private label milk in New York, and the figures that pertained to it were shown to them and they were told that they should go back and talk to their Unit Buyers, the 32 people under their various jurisdictions, and look into private label in each area to see whether or not it would be to the Company's advantage to consider it.

Q. Subsequently, did they do so? A. Yes, sir.

Q. Who was the Purchasing Director in Chicago? A. That was Ira Bartels.

Q. And Mr. Bartels was informed of and made familiar with the A & P private label program in New York? A. Yes, sir.

Judge Hinkes: Let me understand. You say that Ira Bartels was the Purchasing Director for the Chicago—

The Witness: For the Middle Western Division, yes, sir.

Mr. McInerney: Which is situated in Chicago, Your Honor.

Judge Hinkes: Yes.

It was your instruction to him to talk to the Chicago Unit Buyer about it?

The Witness: And St. Louis and Kansas City and [1352] Milwaukee. The people under his jurisdiction, yes, sir.

Judge Hinkes: And Mr. Schmidt would be such a person?

The Witness: That is right.

By Mr. Stone:

Q. In the following two years, did the greater part of the A & P chain commence private label milk programs? A. There were many of them.

Q. Might it be said that this meeting bore fruit? A. Yes, that is a fair inference, I guess.

Q. And might it be said that the Chicago Inquiry was part of a nationwide inquiry of the A & P Company? A. Yes, sir.

Q. And during the subsequent two years, can you name a few of the major cities in which A & P did commence private label milk programs? A. It is a little hard to collect my thoughts on that in relation to the dates that they occurred. I can tell you some of the Divisions that subsequently got into private label but I am not too sure just what you have in mind as to the chronological order.

Q. I wasn't particularly interested in the chronological order. I wanted to find out if a number of Purchasing

Directors had, in turning back to their people, and commenced private label programs as a result of their inquiry. A. Up in the New England area, Boston went into private label * * *

* * * * *

[1361] * * *

Q. During this period between February and August, did Mr. Bartels ever request, or did you ever offer him any information concerning Borden's comparison or concerning Borden's offer in New York for comparative purposes? A. I don't believe I had any dealings with Bartels about private label milk from February to August.

Q. What happened in August, then? A. In August, Mr. Bartels called me and said he had a private label offer from the Borden Company and described it to me on the telephone, indicated that it had an alleged saving of $410,000 over the prices that he presently was paying for milk, and he told me that it was his opinion that the offer was not a satisfactory offer.

For example, it didn't seem to justify us giving up the Borden brand label and taking on the cost of performing the services that were being eliminated, and it didn't give us the return privileges that we were enjoying on the Borden brand, return products to them.

Also, we didn't have any protection in case of a price war. If a price war broke out and we had to meet competitive retails for some period of time, that would be at our expense instead of Borden's expense. It didn't seem like the offer was sufficiently attractive to justify going into private label.

Q. Did you ask Mr. Bartels to send you any information? [1362] A. No.

Q. Did you suggest that Mr. Bartels do anything? A. Yes, I suggested again that he solicit offers from other qualified dairies, and he said he would do it.

Testimony of Herschel Smith

Q. Mr. Smith, I hand you Commission Exhibit for identification 34, which has been marked for identification, and ask you to review this document, if you would please.

Have you reviewed the document? A. Yes, sir.

Q. Does this document refresh your recollection as to any request by Mr. Bartels, or any offer by you, to supply him with Borden's New York bid?

> Mr. McInerney: Your Honor, I don't think there has been any need expressed to have his recollection refreshed on that, but the question has been put and I don't want to impede the examination.
>
> Judge Hinkes: Quite right. I don't think the witness said anything about not remembering, but I think you can ask him about that question once again, if you wish.
>
> The Witness: In my previous answer, I told you that I did talk to Mr. Bartels in August, and this is August, and I presume that this is some kind of a notation that resulted from our telephone conversation, yes, sir.

* * * * *

[1366] * * *

Q. And what did you do at that point? A. Of course, I was surprised to see a Borden re-bid because this is not the customary way for a Buyer to operate, but nonetheless, the offer did seem like it saved more money. His recommendation was that he and his President and his Sales Director agreed that this was the one they wanted to go with and—

> Judge Hinkes: Mr. Smith, you say that you were surprised at the new bid?—
>
> The Witness: Yes, sir.

Judge Hinkes: —by Borden, and I think your language was because that was not the way a Buyer acted; and A & P is the Buyer, isn't it?

The Witness: Yes.

Judge Hinkes: What was the way that A & P acted that was different?

The Witness: The Borden Company had already bid in August and had made—in other words, he asked all the dairies for bids. Borden came in in August with theirs, and we discussed [1367] that it was not a very satisfactory offer. Then subsequently, the Bowman offer came in which was a more attractive offer.

The customary way would be to accept the Bowman bid as our new milk Supplier. He had a better proposition than Borden, but somehow in giving the Borden Company notice of our change of suppliers, apparently they were allowed to make a re-bid.

Judge Hinkes: In other words, you were surprised that Bartels had received, or had solicited as the case may be, a new and better bid from Borden?

The Witness: Yes, my instructions to Mr. Bartels were simply to tell them that we had a better—that we had a new milk Supplier and that we would like to have an estimate of the date when the new Supplier could take over the operation, but instead of that, somebody prevailed on somebody else to accept a new offer.

By Mr. Stone:

Q. And, sir, what did you do at this point? Did you recommend approval? Did you okay it? A. It seemed to have all of the qualities that were required of a milk offer. The recommendation of the people out there was something that you had to consider. Mr. Vogel was an

officer of the Company and these were his Purchasing and Sales Directors who recommended it. The offer was quite evidently cost-justified.

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[1376] • • •

A. It is not my handwriting, but above Mr. Vogel's name it appears that somebody has written that he is the director of sales.

Mr. Stone: Offer CX-263-A through Z-15 with the exception of the handwritten notations.

Judge Hinkes: Is there objection?

Mr. McInerney: No objection, Your Honor.

Judge Hinkes: Mr. White?

Mr. White: Nothing special, Your Honor.

Judge Hinkes: 263 with the sublettering is received as offered.

(The document referred to, heretofore marked for identification Commission's Exhibit CX-263-A through Z-15, was received in evidence.)

Mr. Mathias: Your Honor, I might note for the record that Complaint Counsel had not seen this document before and have not had time to prepare copies and copies will have to be made and supplied to Your Honor and to the other parties.

Mr. McInerney: I would like to note, if I may, Your Honor, just to tie this into the proposed exhibits, the covering letter is a copy of the original, the file copy of which has been marked as CX-67 for identification. The comparison next to it has been marked as Commission Exhibit 65 for identification. • • •

• • • • •

Testimony of Herschel Smith

[1399] Q. Then just two further questions:

Sir, how long have you been with the Great Atlantic & Pacific Tea Company? A. Since 1926.

Q. And are you presently receiving any sort of pension from the Tea Company? A. Yes, I am.

Mr. Stone: No further questions, Your Honor.

Judge Hinkes: Cross examination, Mr. McInerney?

Cross Examination by Mr. McInerney:

Q. Mr. Smith, you mentioned that in about 1964 A&P commenced a general inquiry into the possible advantages of private label milk in various parts of the country. A. Yes, sir.

Q. Was there any particular occasion for that inquiry? A. Yes, there was.

Q. Can you tell us what that was? A. Well, we observed that our competitors in a large way were selling private label milk.

Q. Can you name some of those competitors? A. Yes. Safeway sold private label milk that they produce themselves. Kroger sold lots of private label milk, some of which they produced and some of which they bought. National Tea's Stop & Shop, Food Fair, Acme, Winn Dixie.

[1400] Q. Jewel? A. Jewel.

Q. Any others that you can remember offhand? A. Well, there were many others. Bohack in New York, for example, had private label milk. They are a small chain but they did have private label.

So I caused a survey to be made throughout the United States of A&P's milk buying practices and sent out an inquiry to find out what we were paying, what our competitors were doing, and got it back, and as I looked at this it was evident to me that A&P was probably paying too much for its milk, and in New York where I was located

it was quite obvious to me that we were paying Borden too much for milk in New York.

Q. Why do you say that? A. Well, before we went into private label milk in New York in November of 1964 they came in to me in May of 1964 with a price reduction that was about a millon-dollar price reduction, and said that they wanted to lower their prices in New York so that A&P would be more competitive. Now, this price reduction was not solicited and this followed a similar action about a year previous to that in the spring of '63 in which they then also reduced their milk prices substantially. For example, I recall in 1963 they reduced the gallon price by 18 cents a gallon in the City of New York.

And I recall, too, at that time that we were paying Borden [1401] 23 cents a quart for milk in New York, and some chains, King Cullen for one, were selling milk out of store for 21 cents. And about that same time in the spring of '64 a dairy came into to visit with me, the owners of the dairy, called Glenn & Mohawk. They are located in Fultonville, New York, and they identified themselves as the supplier of private label milk in New York City to Bohack and asked if we would be interested in considering them as a supplier of private label milk for A&P. Their offer to me at that time was to supply milk at 17½ cents a quart and they mentioned at that time that during the flush time of the year when the raw milk supply was flush and the prices were lowest that the milk price in New York might go down as low as 16½ cents instead of 17½ cents.

Some people in our company had seen a study of the Risden Dairy plant in Detroit—I think they were inquiring as to whether the plant should be bought. I think they were trying to sell it. They looked at their books and they were making something like 30 or 50 percent in their milk business. They were our suppliers, and we were their principal customer.

So to answer your question, yes, I was fully convinced that A&P's milk buying practices were not what they should be and that we should look into them promptly.

Q. And among other places that you looked into private label I believe you have testified was in New York. Is that correct? A. That is correct.

[1402] Q. And in New York with whom did you speak in the Borden Company with respect to private label? I think you have said this before but I just want to tie it in. A. Well, I spoke to Mr. Archer about that but also I think I contacted Mr. Brennan oftener. He was the President of the Dairy Seal operation in New York, and I believe he came in oftener and was the responsible party largely in the City. Archer was his superior, and so Archer oftentime sat in with Brennan and talked about New York City.

Q. And ultimately I think you have told us some time in November of 1964 Borden became the supplier of private label milk to A&P in the New York area, is that correct? A. In the New York, District of New York—Metropolitan New York, that is right.

Q. Now, do you recall in approximate terms at least the prices at which Borden supplied private label milk to A&P in New York? Was there a formula of some kind or how did that work? A. Well yes, there was a rule of thumb that was given to me by the dairies at that time as I was getting into the dairy business. They had some rule of thumb which was a guide as to whether or not the milk price was substantially what it should be or what it could be and it was what they called a 2-2-2 formula.

Q. What does that mean? A. It means simply that roughly speaking you can take the [1403] raw milk price that the farmer gets and add 2 cents for the carton, 2 cents for the processing overhead and profit, and 2 cents for delivering it to the store and you have got an approximate cost figure based on a normal dairy's operation.

Q. Now, what I had asked you previously, Mr. Smith,

was what did Borden actually charge you? Did they actually charge you on the basis of the 2-2-2 formula? A. Yes, that is what it turned out to be, yes.

Q. That is per quart of milk? A. Per quart of milk, that is right.

Q. And how did it work out on the half gallon and gallon? A. Well, the half gallon carton was less than two quart cartons and so it was a lesser figure. The overhead I believe was double, the half gallon was double the quart, and the delivery probably was double the quart.

Q. In other words, was the spread between the raw milk price and the price that Borden was charging A&P 12 cents on the half gallon or something less than 12? A. Something less than 12 cents.

Q. On the half gallon. A. On the half gallon. It wasn't exactly double. It was a differential downward from 2 quarts. You saved a little money in the half gallon.

Q. And what about the gallon? A. Well, the gallon, there is still a further differential.

[1404] Q. In which direction? A. Downward direction because you have now only one single wall and there is a saving in delivery somehow in the gallon size too.

Q. Now, following the New York private label arrangement, I believe you told us that Mr. Archer spoke to you about the possibility of negotiating a private label arrangement for Chicago between yourself and Mr. Archer in New York, is that correct? A. Yes, that is right.

Q. In discussing that subject with you did Mr. Archer mention anything about the Woodstock plant in Chicago? A. Oh, yes.

Q. What did he say? A. Well, when this New York private label deal started in New York it was in November of 1964 and it was at that time that this Woodstock plant opened in Woodstock, Illinois. This was a new, modern plant that the Borden Company had built out there and Archer talked to me, every time he talked to me he talked

about this plant and how great it was. He said it was the most modern, largest plant in the world. It had labor-saving devices in there, push button equipment where you push the button and the plant operates all by itself. He said this plant is going to have low cost production, below anything there was, and he suggested that this will give us low price [1405] milk out there in Chicago which we can pass on to A&P and pass on to our other Borden customers, and he wanted me to come out and see it because he just didn't think that I quite comprehended how great this plant was.

Q. Did you go out to see it? A. No, I didn't go out to see it. He wanted me to fly to Chicago and drive on up there and I didn't have the time to make the trip.

Mr. McInerney: Now may we have what has been marked Commission Exhibit 263?

By Mr. McInerney:

Q. I believe you have identified this already, Mr. Smith, as the submission that was given to you by Mr. Bartels about the date that it bears, October 1, 1965, if I recall correctly. A. Yes, that is right.

Q. Now, in testifying with respect to that I believe you started to describe that document and never quite finished your description of it and I will come to that a little later on, but if I recall correctly, thereafter one of the first questions Mr. Stone asked you this afternoon was whether, after receiving that and after taking various steps, you ultimately approved the acceptance of the Borden proposal. A. Yes, sir.

Q. Now, what were the various steps that you took between the time of receipt of that and your acceptance of the Borden [1406] proposal? A. The first thing that I needed to clear up was the letter of availability that came with this offer.

Testimony of Herschel Smith

Q. If you will excuse me just one moment, there is another document that has been marked here as Respondent A&P Exhibit 2. Now, is that the document that you refer to as the letter of availability and does that document also appear as part of Commission Exhibit 263? A. Yes.

Q. I'm sorry, I interrupted your answer.

Would you please read back where the witness was when I asked him that question?

(The reporter read from her notes as requested.)

By Mr. McInerney:

Q. I apologize for the interruption. Would you continue? A. Yes. Well, this letter states from Borden to Elmer Schmidt, you have our price quotations dated September 21, 1965 for milk, cream, and other dairy products in several areas in Indiana and Illinois. We wish to assure you that our prices are proper under applicable law and we are prepared to defend these prices.

Now, there was no letter of availability came with this offer and we customarily get from each milk supplier a letter of availability to assure us that the offer being made to us is in fact available to the other customers on a proportionate equal terms. I called Harry Archer and talked to him about [1407] this—

Q. Was your discussion on the telephone or in person? A. Well, I called him and told him about this and he, as he often did since he was only five minutes walk away from my desk, he walked over to my desk and we discussed it there.

Q. Will you tell us what was said by each of you on that occasion? A. And I told him that this was not a satisfactory letter of availability as far as I was concerned because availability is not mentioned in the letter. And he said, "Well, yes. This is a letter of availability. This is your assurance that this offer is being made available to

other customers on a proportional, equal basis and, further than that, that this letter protects A&P in all events. Generally, a letter of availability means just that, but this is an all-encompassing letter." And he inferred that we were lucky to get such an all-inclusive document.

Q. I'm sorry. I am not sure what your all-inclusive terminology means. Can you tell us? A. Well, a letter of availability would simply assure us that the company, the dairy, the seller, is going to make this available to his other customers and so that it would be—that would be our assurance, but this would seemingly hold us harmless in all events, whatever they may be, so you have—I can't tell you what that might ever include, but it will be [1408] a letter of availability and anything else that may arise. So he touted this to me as being an especially fortunate document as far as I was concerned.

Mr. White: I would like to make a motion to strike the answer insofar as the witness' interpreting the language and not giving us the conversation that actually took place between himself and Mr. Archer.

Judge Hinkes: Well, let's be sure we understand exactly what Mr. Archer told you as distinguished from what you may have understood him to mean. Would you tell us once again, Mr. Smith, exactly what he told you when you said that there was no letter of availability?

The Witness: Well, I have to paraphrase it, Your Honor, because I don't have the verbatim conversation.

Judge Hinkes: As nearly as you can.

The Witness: But the gist of the message was that this is a letter of availability and this assures A&P of the availability to Borden's other customers, and he used such words as they were to lead me to believe that this is more than—

Mr. White: I object, Your Honor. Tell us what—

Judge Hinkes: Tell us what words he used or the approximate words, if you can't remember the identical words.

The Witness: Well, it would seem that "All-encompassing" would be the kind of words that he used here.

[1409] Judge Hinkes: Did he represent to you that this was the same as a letter of availability and even more than a letter of availability?

The Witness: That is right, sir.

Judge Hinkes: Now, what language of his did he use to convey that impression to you as best you can remember?

The Witness: I would say that he used words like "all-encompassing".

Judge Hinkes: Very well.

The Witness: My objection to Mr. Archer at that time was "Why don't you just give us a letter of availability like you always do," and so he was apparently defending—

Judge Hinkes: Well now, what did he answer when you said that?

The Witness: That this is a letter of availability and it is my assurance that it is available to the other customers.

Judge Hinkes: Very well.

By Mr. McInerney:

Q. And did he also tell you in words substantially that this was a representation that A&P would be held harmless in all events? A. That is the gist of what he was talking about.

Mr. Mathias: I object to that.

Mr. White: I object to that. Again it is the gist. [1410] Now he is trying to put words in the witness' mouth, and the witness has something to add to the conversation and I thought he had concluded it.

Mr. McInerney: The witness himself had used the words "hold harmless" previously. I did not invent those words. I think the record will so show.

Judge Hinkes: Well, you have to be very careful, Mr. McInerney. You must remember this witness is a former employee of your client.

Mr. McInerney: Yes, Your Honor.

Judge Hinkes: And under those circumstances your freedom of cross-examination has to be somewhat limited so that perhaps what Mr. White might ask him is not exactly the same thing that you would be permitted to ask him.

Mr. McInerney: Your Honor, I want the witness to understand, and I hope Your Honor will instruct him, that it is not incumbent upon him to reconstruct verbatim what happened; if he can give us the substance of the conversation that that is sufficient.

Mr. White: And that is what his Honor asked him and that is what he gave.

Judge Hinkes: Yes, that is what he had given. Of course if we try to elaborate upon the answer we run into some very great dangers by suggestion, if nothing else.

Mr. Stone: Your Honor, in this light I think it is [1411] becoming clear that Mr. McInerney is beginning to put in a defense and that he is using the witness, which is obviously a friendly witness. Thus I would suggest that it would be appropriate to limit Mr. McInerney to the type of questions which might be asked on direct examination.

Mr. McInerney: Your Honor, I am not. If the suggestion is that this was leading the witness in some way, I picked up some language that he used and asked him if that was part of the substance of the conversation. That is all.

Judge Hinkes: Well, let me see if we can get this back on the track again.

Mr. Smith, once again, tell us what Mr. Archer told you in the words that he used, or in the substance of the thought that he conveyed. What did he tell you about this letter?

The Witness: Well, I believe my problem at that time was a lack of a letter of availability. When it was determined that this was a letter of availability I was satisfied—

Judge Hinkes: Well now, wait. I don't think you are following my question. You were concerned about what you thought was a missing letter of availability?

The Witness: Yes, sir.

Judge Hinkes: You asked Mr. Archer about a letter of availability, why he did not supply it?

The Witness: Yes, sir.

[1412] Judge Hinkes: Now then, he answered what?

The Witness: That this is a letter of availability, this is my assurance.

Judge Hinkes: Now, did he add anything to that observation? Did he say anything more about that letter than that it was a letter of availability?

The Witness: Yes. He indicated to me that this is more than a letter of availability.

Judge Hinkes: And what did he say it was in being more than a letter of availability? If anything.

Testimony of Herschel Smith

The Witness: Because Borden would hold us harmless.

Judge Hinkes: Mr. Archer represented to you that Borden would hold A&P harmless, is that what you are saying?

The Witness: In connection with these prices, yes, sir.

Judge Hinkes: In connection with these prices. And that that was the effect of that letter?

The Witness: That is right.

Judge Hinkes: Very well, you may continue, Mr. McInerney.

[1413] *By Mr. McInerney:*

Q. Did Mr. Archer tell you how this letter came to be prepared? A. He said it was prepared by the Borden lawyers and he made some statement about the fact that naturally Borden was an honorable company like A & P is an honorable company and they wouldn't do anything illegal in an operation as important as this one.

Q. Can you presently recall anything else with respect to that conversation? A. No, I don't believe there was anything further on that conversation.

Q. Now, again going back to Mr. Stone's question about after taking various steps you finally accepted this quotation, what was the next step? A. I sent it to the Legal Department for their approval.

Q. And after that? A. Then I called the Chicago people out there, Bartels, to tell him that this was approved and he could accept it, he could put it into motion.

Judge Hinkes: Did you call or did you write?

The Witness: I called and confirmed it, sir.

Testimony of Herschel Smith

By Mr. McInerney:

Q. Now did you compare at that time the Bowman prices and the Borden unit prices on the various products? In other words, you had two bids, two quotes, before you and did you look to [1414] see what the prices were per quart, half gallon and gallon on each of those quotations and compare the two of them? A. I observed that the Bowman and Borden quotations were very close to each other, that the gallons and half gallons were quite close. The quart, as a matter of fact, that Bowman was lower than Borden, and on the half gallons and gallons the difference was almost infinitesimal, it was so small.

Q. And even though the difference may have been infinitesimal, you at that time decided to accept the Borden quotation, is that right? A. That is right. The document itself looks to be a much more attractive, considerably more attractive offer.

Q. Which document, sir? A. The document that Mr. Bartels sent with this letter shows that the Borden offer is substantially better than the one from Bowman.

Q. In other words, the document prepared or sent to you by Mr. Bartels indicates that the Borden offer is more attractive than the Bowman offer? A. Yes, sir.

Q. And yet, if I understood you correctly, comparing the unit prices, the difference was infinitesimal at best? A. Yes.

Q. Now— A. It was a matter of mills. Maybe "infinitesimal" isn't a [1415] good word there. It was small, mill differences.

Q. And on the quarts, for example, the Bowman quotation was better? A. Was actually lower, yes.

Q. Now, did you at that point in time examine each of these quotations in detail to make your own analysis as to whether the Bowman quotation or the Borden quotation was better from the point of view of A & P? A. No, I did not.

Q. Have you done so since at my request? A. Yes.

Q. And can you tell us what the result of that analysis is?

Mr. Stone: Your Honor, I would object. I believe the documents speak for themselves.

Mr. McInerney: Your Honor, I don't see how there can be any debate about this. I think the witness' answer will show that the documents do not quite speak for themselves.

Judge Hinkes: I will overrule the objection, but let me understand, Mr. Smith. You originally said that the Borden bid was much better than the Bowman.

The Witness: Yes, sir.

Judge Hinkes: Whose language was that? Who thought so? You or Mr. Bartels?

The Witness: Well, he said it to me, and the figures at the bottom of the line here look like, yes, that is right, [1416] it looks from the document he sent me that, yes, that is right.

Mr. McInerney: Would you identify the document you are speaking of?

Judge Hinkes: That is 263?

The Witness: Yes. It is this 263.

Mr. McInerney: Is it 263-B?

The Witness: 263-B is the summary of the one versus the other one, yes, sir.

Judge Hinkes: And then you have subsequently made a closer examination of the figures and a comparison, is that correct?

The Witness: Yes, I have.

Judge Hinkes: At the request of Mr. McInerney?

The Witness: Yes, I have.

Judge Hinkes: You may continue, Mr. McInerney.

Testimony of Herschel Smith

By Mr. McInerney:

Q. Mr. Smith, 263-B is what you were referring to before, when you said that despite the fact that the unit prices appear to be very close there was something there that made the Borden bid seem better than the Bowman bid, is that correct? A. Yes.

Mr. McInerney: I am sorry. There was a pending question and then there was an objection. Would you read back that question?

(The question was read by the reporter.)

[1417] The Witness: In closer examination of these documents we found, I found, that the Bowman bid was based on a higher raw milk price than the Borden bid, and I also found that the Borden bid was based on a 3.4 butterfat product, whereas Bowman's bid was on the basis of the 3.5 butterfat product.

By Mr. McInerney:

Q. Can you tell us what the significance of those differences is? A. Well, my method here was to change them both to the same raw milk price and change them both to the same 3.5 butterfat price, and in doing that in all three cases—the quarts, the half gallons and the gallons—the Bowman bid was a lower bid than the Borden bid when they were both put on a comparable basis from the standpoint of the cost of the raw milk and the butterfat content of the finished product.

Q. Is it customary in the dairy industry that a customer like A & P can obtain either 3.4, 3.5, 3.6 or whatever butterfat content is legal that the customer wishes? A. Yes.

Q. And so with those adjustments, which offer was the better offer from the point of view of A & P?

Testimony of Herschel Smith

Mr. Stone: Again, Your Honor, I think the documents speak for themselves.

Judge Hinkes: No. I will allow the witness to [1418] answer.

The Witness: The Bowman bid has lower prices and I would say that it is the bid that should have been accepted.

By Mr. McInerney:

Q. Was the Bowman bid comparable to the Borden bid on the subject of whether private label was being offered and only private label being offered? A. No, I think both bids were predicated on supplying private label and the brand label. They would both be offered and stocked to some extent in the stores and the Bowman label was quoted to Mr. Bartels at the same prices as the A & P label, whereas the Borden label was quoted as a substantially higher figure.

Q. Well, my question, sir, was: examining the two quotations that you received—

Mr. Stone: Excuse me, Your Honor, I would move to strike the last answer on the basis that the witness indicated it was sheer speculation. He said, "I think—" and then went on.

Mr. McInerney: Your Honor, I really think this is improper impairment of the examination. We are trying to get the witness' best recollection, and I will clarify this if there is anything unclear about it.

Judge Hinkes: You may go on. I will deny the motion to strike. We will let the answer stand and argument may be made on the probative worth of such an answer.

[1419] Mr. McInerney: Your Honor, I don't know quite where we are. I am just going to ask Mr. Smith to continue in his own words.

Testimony of Herschel Smith

The Witness: Well, at this late date it is evident to me that if this document had been prepared and analyzed properly at the time, the Bowman bid would have been the more attractive of the two.

By Mr. McInerney:

Q. But you were speaking before the interruption about the two quotations before you being for private label milk, as I recall. A. Yes

Q. My question was: Were they both for private label only? A. No, they were for private label and their own respective advertised brands, the Bowman brand for Bowman and the Borden brand for Borden.

Q. In the case of Borden, was there a difference between the price being offered for the Borden brand and the private label? A. Yes, there was.

Q. In the case of Bowman, was there any difference between the price being offered for the Bowman brand and the private label? A. No, they were both the same.

Q. In other words, from the document before you, the Bowman quotation, that quotation is for those prices whether you took private label or Bowman label, is that correct? [1420] A. That is correct.

Q. But that is not true of the Borden quotation on private label? A. That is also correct.

Q. Now, did you ever discuss with anyone from Borden what A & P's out-of-store price would be on milk or dairy products in Chicago? A. No, never.

Q. Did anyone from A & P in your presence ever discuss that subject with anyone from Borden? A. No, sir.

Q. Does Borden still supply milk to A & P in Chicago? A. No, sir.

Q. As of when, if you recall, was that discontinued? A. Within the last two years, less than two years.

Q. And why? A. A better quotation was received from Dean Foods.

Q. I am sorry, I didn't hear the end of that. A. A better quotation, a better offer, was received from Dean Foods.

Q. Did Mr. Archer in the conversation that you had with him with respect to this letter that you have been describing as the letter of availability, did he ever mention meeting competition with respect to this Borden quotation? A. Never.

* * * * *

[1439]

A. Yes. It is my custom to send them a xerox copy of this kind of material so that wouldn't necessarily interfere with the conversation with Mr. Archer.

Q. What is your best recollection as to when you talked to him: at the beginning or the middle or the end of this period that you have described? A. It would have to be an estimate on my part. There is just no way I could reconstruct it. I would think it would be promptly, but not necessarily.

Q. Well, had you heard from the Law Department before you talked to Mr. Archer? A. Well, there again, I believe I talked to Mr. Archer before I talked to anybody from the Legal Department.

Q. So at least that gives us some sequence to it.

Now, you said you telephoned Mr. Archer. Would you tell us what was said in that telephone conversation? Did you invite him to come over? A. It would have been a factual statement to the effect that "I have received this offer from your people in Chicago and attached to it is a letter that doesn't give me a letter of availability, and I would like to talk to you about it," and so, as is customary with him, he came over and talked about it at my desk.

Q. Did he come right over? A. Yes, he did.

[1440] Q. He responded relatively immediately to your call? A. Yes.

Q. And how long was your conversation with him in your office? A. I don't believe that took very long.

Q. Well, did it take 15 minutes? A. Probably 15 minutes.

Q. And who was present besides yourself? A. The two of us. Nobody.

Q. Did you ever reduce to writing the substance or any part of this conversation? A. No, I didn't.

Q. Would you tell us again exactly as best you can and in the sequence that you remember it, what was said? A. I told Mr. Archer that this letter that came in with this offer from Chicago was not a letter of availability as we customarily get. And he assured me that this was a letter of availability and he told me that this was more than a letter of availability.

Q. Anything further? A. No. That is the substance of it.

Q. I see. There is nothing you would like to add to that?

Mr. McInerney: I assume—

Mr. White: I don't want an informative objection here. We have had enough answers.

* * * * *

[1445] * * *

We don't have to take two successive recesses with an interval of only two questions in between. That is hardly an expeditious use of our time.

We will take a very short recess at this time.

Mr. Stone: Thank you.

(Brief recess.)

Judge Hinkes: Mr. Stone.

Testimony of Herschel Smith

Redirect Examination by Mr. Stone:

Q. Mr. Smith, you mentioned in connection with the testimony you gave at Mr. McInerney's behest that you had conducted an examination at a later time of the Borden bid and the Bowman bid, and had drawn certain conclusions. A. Yes, sir.

Q. And that this was done at Mr. McInerney's specific request? A. Yes, sir.

Q. Was that study made in any way in connection with this litigation or the allied litigation?

Mr. McInerney: I am not sure the witness knows what the allied litigation is. Perhaps we could just drop that.

Judge Hinkes: Let's separate that if we can.

Mr. Stone: In this litigation?

[1446] The Witness: This difference started to be revealed as we studied this document carefully. There are many pages here. And the inconsistency of the raw—

By Mr. Stone:

Q. I asked you when the study was made.

Mr. McInerney: "When was the study made?" Is that the question?

Judge Hinkes: Yes.

Mr. Stone: That is what I said, yes. When was the study made?

Judge Hinkes: The study which led to his realization that the price was based upon a higher raw milk cost and a higher butterfat content.

Mr. Stone: And at Mr. McInerney's behest.

The Witness: Yes. I am not sure what the date was. Probably within the last eight months.

Testimony of Herschel Smith

Mr. Stone: Thank you.

No further questions, Your Honor.

Judge Hinkes: Let me understand something, Mr. Smith. You got Commission Exhibit 263 from whom?

The Witness: From Ira Bartels.

Judge Hinkes: And you got that back in 1965?

The Witness: That is correct.

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Testimony of Elmer Schmidt

July 9-10, 1973

* * * * *

[1667] * * *

Q. But the Middle Western Division did take in more territory than the Chicago Division? A. Yes, sir.

Q. At the time there was a Middle Western Division, was the Chicago portion always a portion of this Middle Western Division? A. Yes, sir.

Q. Within the Middle Western Division, what was the chain of command through to the New York headquarters? A. The Chicago unit was responsible to the Middle Western Division and of course the Middle Western Division in turn was responsible to New York. Each department within the Chicago unit had a counter department within a divisional office and so into headquarters as well.

Q. You stated prior to 1969 you were the head buyer for the Chicago unit? A. Yes, sir.

Q. When did you start in this position, sir? A. In August of 1964.

Q. Would that be about the beginning of August? [1668] A. It is my recollection it was the early part of August, yes, sir.

Q. During this period of time you have stated that there were counterparts of the division of the unit departments at the division level. Who was your counterpart at the division level during this period of time? A. It was Mr. Ira R. Bartels.

Q. What was his title, sir? A. Divisional director of purchases.

Q. As head buyer for the Chicago unit, what were your responsibilities? A. Basically as the head buyer for the Chicago unit, I was responsible for the procurement of

merchandise for resale in our stores. This has many facets and products.

Q. You were responsible for the purchase of all of these products? A. I had a measure of responsibility for the purchase of all of these products.

Q. By measure, I take it you had other buyers working under you? A. Yes, sir.

Q. In the case of dairy products, was there a dairy buyer or did you handle this personally? A. As far as procurement of dairy products is concerned, except for cheeses, with the exclusion of cottage cheese, I was * * *

* * * * *

[1679] * * *

Mr. Mathias: That is the only relationship mentioned so far.

Mr. McInerney: The word "association" is vague.

Judge Hinkes: Do you know how long the buyer-seller relationship existed between A&P and Borden?

The Witness: I know it was for many years.

By Mr. Mathias:

Q. In this period 1964-1965, in the terms of A&P's retail sales of fluid milk and milk line products, approximately how much business was involved in the milk and milk product business of A&P? Again, this would be in 1964 and 1965.

Mr. McInerney: I am not sure I understand the question. Is this in terms of percentage of sales?

Mr. Mathias: In dollar amount.

Mr. McInerney: If the witness understands the question, I have no objection.

The Witness: I would estimate that we were purchasing approximately $125,000 of milk products from the Borden Company.

Testimony of Elmer Schmidt

By Mr. Mathias:

Q. $125,000? A. A week.

* * * * *

[1691] * * *

Q. Mr. Schmidt, did Commission Exhibit 14 and Commission Exhibit 18 with various subparts collectively constitute a quotation on private label milk and dairy products for the entire Chicago unit? A. I would believe that they are covered, yes, sir.

Q. Mr. Schmidt, I hand you Commission Exhibit 21-A through U and ask you if you are familiar with this document, sir? A. Yes, sir.

Q. Have you seen this document before, Mr. Schmidt? A. To the best of my recollection it seems to be the type that I did see before, yes, sir.

Q. Do you know under what circumstances you had seen this document previously? A. No, I do not recall the specific circumstances.

Q. What is it, sir? Do you recall that? A. I believe that the distinction between the two—

Q. Between 18 and 21? A. Between 18 and 21, Exhibit 21 seems to be more complete in giving the quotation for certain areas, depending on the number of deliveries per week.

Q. CX 21 was basically a revision of CX 18. Is that the case, sir? [1692] A. I believe I would agree with that, yes, sir.

Q. Do you know whether or not Mr. Tarr would have delivered this document to you? A. Most likely, he did.

Q. At any time during the negotiations, you have mentioned that you dealt primarily with Mr. Tarr. Did you have dealings with anyone else at the Borden company?

A. I have no recollection of anyone other than Mr. Tarr being at my desk but I know on occasions Mr. Minkler was at my desk in 1965 and I recall specifically one time when Mr. Joe Malone was at my desk but I have no specific recollection because of the time element involved here as who came on what date with whom and for what purpose.

Q. Do you recall the occasion on which Mr. Malone visited with you? A. The one occasion I recall where Mr. Malone was with Mr. Tarr was where he made a presentation, if you care to call it that, of a cost comparison distribution system, Chicago-New York.

Q. You don't recall any other conversations you had with Mr. Malone? A. I do not recall any specifically other than that one.

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[1706] AFTERNOON SESSION

1:30 P.M.

Judge Hinkes: On the record.

You may continue, Mr. Mathias.

Elmer R. Schmidt resumed the stand and testified further as follows:

Direct Examination by Mr. Mathias (Resumed):

Q. I hand you Commission Exhibits 40, 41, 38 and 39. Would you review those, please.

Referring to Commission Exhibits 40 and 41 for identification which appear to be copies of the same memorandum, one signed and one unsigned, can you identify these documents, sir? A. I believe the unsigned one was part of the files maintained in my department. The one that was signed was the one that was forwarded to Mr. Bartels with the quotations.

Q. When you mention quotations, those are the quotations referred to in the memorandum. Would those be Commission Exhibits 38 and 39? A. I would have to see those again.

Testimony of Elmer Schmidt

Q. Those are in front of you, sir. A. It is my recollection they might have been these.

Q. Do they appear to be the attachments to this memorandum? A. It would be my recollection that they would have been attached.

[1707] Q. Referring to CX-41, there is handwriting on CX-41 in two places. Ignore the handwriting in the lower left hand corner. It is just a reference to a Commission file, but in the middle of the sheet, middle of the page, there is a handwritten notation one word underlined. Can you identify the handwriting thereon? A. Yes, Mr. Mathias, that is my handwriting.

Q. What is the word? A. The words is "insufficient."

Mr. Mathias: I offer CX-41, 42, 38 and 39 in evidence.

Mr. McInerney: No objection.

Mr. White: Your Honor, I would like to ask a few questions.

Judge Hinkes: Very well.

Voir Dire by Mr. White:

Q. Mr. Schmidt, when did you place the word "insufficient" on CX-41? A. It occurred after the 16th and after a conversation with Mr. Bartels. I do not recall the specific date.

Q. But after you had forwarded CX-40 to him? A. Yes, sir.

Mr. White: That is all right now, your Honor.

Judge Hinkes: 38, 39, 40 and 41 are received.

[1708] (The documents referred to, heretofore marked for identification as CX-38, 39, 40 and 41 were received in evidence.)

Judge Hinkes: Off the record.

Testimony of Elmer Schmidt

(Discussion off the record.)

Judge Hinkes: On the record.

By Mr. Mathias:

Q. Mr. Schmidt, I hand you Commission Exhibit 45 for identification and Commission Exhibit 46D through F for identification and Commission Exhibit 47 for identification and Commission Exhibit 48A through I for identification and ask you to familiarize yourself with those documents, sir. A. I have read them, Mr. Mathias.

Mr. McInerney: Excuse me a minute, I have not.

By Mr. Mathias:

Q. Mr. Schmidt, referring to Commission Exhibit 45 for identification, whose handwriting appears on this paper, sir? A. This is mine.

Q. What was the occasion for preparing this note which appears to cover a span of time from August 18 to October 12, 1965? A. This is a personal memo that I prepared for myself recording the conversations I had with Henry Soldwedel or his office concerning any interest he might have in quoting on private label milk.

Q. Mr. Soldwedel was with what company? [1709] A. Wanzer Dairy.

Q. Did Mr. Soldwedel or Wanzer ultimately submit a quotation? A. No, they did not.

Q. Mr. Schmidt, referring now to Commission Exhibit 46D through F for identification, can you identify these papers? A. Yes, I can, Mr. Mathias.

Q. What are they? A. Basically they are my small attempt to prepare forms that might be used by me in the solicitation of quotations for private label. At that particular time we did not have any forms, none were at the desk when I took it over. To the best of my knowledge none was available from higher echelon.

Recognizing that the Borden Company's format and preparation and submission of the quotation to me had some merit, I merely had my secretary copy the paragraph designation, so to speak, from the Borden documents and put in this form.

The product list, of course, I devised myself from our standard list of items. After I prepared them, I placed them in my file and never did use them and they remained there, of course, until you gentlemen saw copies.

Q. In your contacts with other dairies, did you request data along this general format from the various dairies? A. It is not my recollection that I used this identical format, no, sir.

Q. Referring then, Mr. Schmidt, to Commission Exhibit 47, [1710] can you identify this document, sir? A. Yes, sir, this is a letter that I sent to our financial department in our headquarters in New York City, as you will note, requesting a Dun and Bradstreet report on Sidney Wanzer Dairy.

Q. Commission Exhibits 48 A through I is the Dun and Bradstreet report you received as a result of that request? A. Yes, sir.

Q. Mr. Schmidt, in addition to Wanzer, what other dairies were contacted concerning the supply of private label milk to the Chicago unit of A&P? A. I contacted Bowman Dairy, Dean and Hawthorn Melody.

Q. Approximately what period of time was this contact made? A. Approximately early August of 1965.

Q. I call your attention to Commission Exhibit 45 again, your handwritten memorandum concerning Wanzer Dairy and ask if this would refresh your memory in this regard? A. It is August of 1965—perhaps not as early as I indicated it was.

Q. Did you contact all at approximately the same time? A. Yes.

Testimony of Elmer Schmidt

Q. After reviewing CX 45 would it be your opinion this was approximately August 18, 1965? A. It is in the general area of the 18th, yes, sir.

Mr. Mathias: I offer CX-45 in evidence.
[1711] Mr. McInerney: No objection.
Judge Hinkes: CX-45 is received.

(The document referred to, heretofore marked for identification as CX-45 was received in evidence.)

By Mr. Mathias:

Q. Mr. Schmidt, did you receive offers from any of these other companies that were contacted in mid-August of 1965? A. Yes, I did receive the quotation from the Bowman Dairy Company and we did receive a quotation from Dean. However, it was for the Indiana territory only.

Q. I hand you Commission Exhibit 50A through V and ask you if this is the offer which you received from the Bowman Dairy Company? A. Yes, sir, it is.

Q. I hand you Commission Exhibit 51A through C for identification and ask you if this is the offer you mentioned from the Dean Company for northern Indiana? A. Yes, sir.

Q. Mr. Schmidt, were you interested in an offer for the northern Indiana stores only? A. No, we were not, Mr. Mathias.

Mr. Mathias: I offer Commission Exhibit 50A through V and 51A through C in evidence.
Judge Hinkes: Received.

[1712] (The documents referred to, heretofore marked for identification as CX 50A through V and 51A through C were received in evidence.)

Testimony of Elmer Schmidt

By Mr. Mathias:

Q. Mr. Schmidt, prior to seeking quotations from other dairies, did you inform the officials of the Borden Company that you were going to seek other bids for this business? A. Yes, sir, we did.

Q. Subsequent to receiving the offer from the Bowman Company, did you inform Borden that you had received a competitive bid below the price they had offered? A. No, sir.

Q. Mr. Schmidt, I now hand you Commission Exhibits 62A through 62-Z2 and 56A through X and ask if you are familiar with these two documents, sir? A. Yes, sir.

Q. Are you familiar with both of these documents? A. Yes, sir.

Q. Do you recall having received both of these documents from Borden, sir? A. I recall specifically the document dated September 21. I know that our organization —I say our organization, but by my department—received a document dated September 14 and subsequently seen by me, of course.

Q. Mr. Schmidt, was the document dated September 21, 1965, [1713] that is, Commission Exhibit 62 with sub parts, the final offer of the Borden Company? A. Yes, sir, it was.

Q. This was tendered to you on or about September 21? A. Yes, sir.

Q. Was this delivered to you by Mr. Minkler and Mr. Tarr on or about that date? A. Yes, sir.

Q. You answer was yes? A. Yes.

Q. I hand you Commission Exhibit 65A through C for identification and I ask you if you can identify this document? A. Yes, sir, I can identify them.

Q. Referring to Commission Exhibit 65A for identification, Mr. Schmidt, whose handwriting appears thereon? A. That is my handwriting.

Q. Does that include all of the figures that have been penciled in as well? A. Yes, sir.

Q. Commission Exhibit 65B and C seem to be approximately two copies of the same thing. Were these prepared by your office, sir? A. Yes, sir.

Mr. Mathias: I offer Commission Exhibit 65A through C into evidence.

[1714] Mr. McInerney: I don't have a copy of C, but if it is a duplicate, I see no reason for two of them.

Mr. Mathias: Let me make a brief check to see if they are identical. If they are, we will just offer A and B.

They do seem to be identical, so I will amend complaint counsel's officer to include only Commission Exhibit 65A and B.

Judge Hinkes: 65A and B are received.

(The document referred to, heretofore marked for identification as CX 65A and B were received in evidence.)

By Mr. Mathias:

Q. I hand you Commission Exhibit 65A and B for identification. Mr. Schmidt, and I ask you to familiarize yourself with this document. I am sorry it is in cut up form, but this is the way we received it from A&P. A. Yes, sir, this is a document that I wrote to Mr. Bartels at my home in Libertyville and sent on into his office.

Q. This was prepared on September 28, 1965, was it, sir? A. Yes, sir.

Mr. Mathias: I offer CX 66A and B in evidence.

Mr. McInerney: No objection.

Judge Hinkes: Exhibit 66 is received.

Testimony of Elmer Schmidt

(The document referred to, heretofore marked for identification as CX 66A and B were received in evidence.)

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[1720] *By Mr. Mathias:*

Q. Mr. Schmidt, your handwritten notation at the bottom of Commission Exhibit 70A indicates that service of private label from the Borden Company will begin on November 1st. Is that in fact when service did commence under your private label arrangement with Borden? A. That is my recollection.

Q. That would be November 1, 1965? A. Yes, sir.

Q. Mr. Schmidt, I hand you Commission Exhibit 75A through J which is already in evidence and I note on a number of papers there are handwritten notations in the margin. I wonder if you could tell me whether or not you can identify the handwriting? A. That is my handwriting.

Q. I think there is some on subsequent pages, too.

I note on Commission Exhibit 75A and B there are handwritten notations. Is all of that in your handwriting, too, sir? A. Yes, it is, Mr. Mathias.

Q. I note also on Commission Exhibit 75I and J that certain stores or certain towns' names have been lined through. Do you recall whether or not you were the one who lined out these particular names? A. I don't recall whether I did or not.

• • • • •

[1727] • • •

By Mr. Mathias:

Q. You had identified the figures appearing there above in the circled area as being the handwriting of Mr. Witzke. Can you tell whether or not the handwriting at the bottom of the line attached to the bottom of that circle is that of Mr. Witzke? A. Yes, sir.

Testimony of Elmer Schmidt

Q. It is the handwriting of Mr. Witzke? A. Yes, sir.

Judge Hinkes: Commission Exhibit 103 is received.

(The document referred to, heretofore marked for identification as CX 103D through F was received in evidence.)

By Mr. Mathias:

Q. Mr. Schmidt, in your dealing with Borden, did you request any special formula or specifications for the milk or dairy products to be supplied under the private label? A. It is my recollection that when we first discussed private label that I indicated to them that the quotation should be developed on the basis of advance order system.

Q. I am talking about the formula for the product now, the butterfat content of the milk, the curd or acidity of cottage cheese, chocolate milk formula, and so on [1728] A. No, sir.

Q. There was no request for any special product according to A&P's specifications? A. No, the only comment I recall in that regard was we certainly wanted the product to meet the minimum legal requirements of the city of Chicago and any other community that we had stores in that they would be servicing.

Q. Borden was already servicing the greater portion if not all of this territory, was it not? A. Yes, sir.

Q. Presumably its products meet the legal minimum specifications in all those areas already, is that not true? A. To the best of my knowledge that is true.

Q. Is it your belief you would be receiving the same products under the A&P label that Borden put under its own label? A. I don't recall that I knew what Borden's specifications were for products under their own label. It

is my recollection that I indicated to them that the minimum legal standard should be met for the A&P label.

Q. In your dealings with any of the other dairies contacted, did you request any other specifications of them? A. No, sir, I did not.

Q. It was on this same basis—as long as it met the legal minimum specifications in each of these communities, that was all right? [1729] A. Yes, sir.

Q. In November of 1965 and the period immediately thereafter, when A&P introduced private label milk and dairy products into the store, did it reduce the price of the private label products? A. To my recollection, we did not.

Q. Following the beginning of purchases of private label milk and dairy products from the Borden Company in November, 1965, and subsequently thereto over in the next year or two, did you inquire to see if Borden's prices were being made available to other of its customers in these market areas on the Borden label or private label?

> Mr. McInerney: Could I have that question read back, please. It is a little complicated.
>
> Mr. Mathias: I will strike it and rephrase it. It got a little involved.

By Mr. Mathias:

Q. Following November, 1965, did your office inquire to see if the price which Borden had granted to you on private label had been made available to its other customers in these market areas? A. I do not recall that I made any direct inquiry, no, sir.

Q. Did you request Borden at any time that they supply you with their published prices and published discounts for the areas covered by your Chicago unit? A. No, sir, I did not, and I believe at that point in my [1730] experi-

ence as a buyer of dairy products I would have recognized that there was no such thing as a published price.

Q. Did Borden in this period, November, 1965 and 1966 sell private label to any other chains in the Chicago market area? A. Again, may I ask, Mr. Mathias, if you will repeat the time element here.

Q. In late 1965 and 1966. A. It seems to me that in 1966, 1967—perhaps more like 1967—Mr. Gose who was calling on us at that time indicated that he had acquired or the Borden Company had acquired a new private label account, but the time element is vague in my memory.

Q. Do you recall who that account was, sir? A. It is my recollection that it was the Eagle Stores.

Q. They were primarily down in the southern area of Illinois, were they not, sir? A. No, sir, they had stores in the northern section of Illinois—Rockford, Waukegan area.

Q. In connection with that private label arrangement, is it possible that this occurred in the middle or later part of 1968?

Mr. White: I object to whether it is possible.
Judge Hinkes: Rephrase your question.

By Mr. Mathias:

Q. Do you presently recall exactly or approximately the date on which Mr. Gose notified you of this private label arrangement? A. I do not have an accurate recollection of the time of the [1731] year.

Q. Mr. Schmidt, subsequent to November, 1965 and through the period 1965 and 1966, did you have occasion to keep track of the milk volume of sales out of the A&P stores in the Chicago unit? A. The Borden Company supplied us with the total sales figures by brand by weeks.

Q. Do you recall, sir, whether during the period 1964, 1965 and 1966 that A&P's volume of milk sales was declin-

ing through this period? A. Through the period of 1965-1966?

Q. Starting in 1964 and on through 1965 and 1966? A. It is my recollection that I was aware that our milk sales were declining along with our general sales volume, yes, sir.

Q. Sir, are milk and dairy products an important line in your A&P grocery stores? A. Yes, sir.

Q. Why is that, sir?

Mr. McInerney: Your Honor, I am going to object to continuing questions along this line in that I think as there has been previous testimony there is a dichotomy in A&P between the buying and selling function and there is a completely separate chain of command with respect to both. This witness is not on the merchandising side of the business. I don't think he is qualified with respect to the sales functions.

[1732] There will be opportunity, I think, for Mr. Mathias to inquire with respect to that if he needs to, but I think we have already given him certain admissions with respect to the importance of milk and dairy products.

Mr. Mathias: This witness was not only the head buyer, but he was a member of the Executive Committee of the Chicago unit and from his description of the Executive Committee, it would seem that one of the purposes of this committee was to keep each of the departments informed to developments in the various departments, and this would be a very important part of his duties as a buyer to be aware of this type of information.

Mr. McInerney: We have not established what they have done. We only established what they might have done.

Judge Hinkes: I will let you develop this on cross examination.

Can you answer the question, Mr. Schmidt?

Mr. Mathias: Would you repeat the question, please.

(The question was read by the reporter.)

The Witness: Yes, they are important.

By Mr. Mathias:

Q. Why is that? A. As I indicated in earlier testimony, our purchases amounted to approximately $125,000 per week.

Q. Going back to the time when you took over as head buyer in the Chicago unit, you stated that you were responsible for [1733] the overall purchases of the Chicago unit at that time.

Mr. Schmidt, in this period of late 1964 and 1965, did the A&P stores in the Chicago unit carry private label products under most of the lines of merchandise such as canned goods, frozen foods? A. Yes, sir. We had good representation of private label in most categories in the grocery section of our stores.

Q. Mr. Schmidt—

Mr. McInerney: I think I am going to object to the continuing use of words like "most" unless there is some definition of it. I don't know that this witness is qualified to say what percentages were, and so on, of these various lines.

Mr. Mathias: Your Honor, there were no percentages mentioned, and the witness as the head buyer in charge of purchasing the broad line of products for the Chicago A&P stores certainly should be aware of what products are going into

them and I believe his answer was appropriate and adequate.

Judge Hinkes: His answer may be sufficient for your purposes. If that is the case, we will let it stand there. If there is going to be much more of critical importance to the answer he gives, then I would suggest you go into the question of percentages.

By Mr. Mathias:

Q. Mr. Schmidt, were you aware in 1964 and 1965 and 1966 of the identity of the major competitors of A&P in the Chicago area? [1734] A. In a general way, yes, sir.

Q. Who would these be? A. Jewel Tea, National, Kroger, High-Low, Certified Group—those, in my opinion, would be major competitors.

Q. Did Borden supply any of these competitors with private label milk and dairy products? A. Not to my knowledge.

Q. Do you know whether or not Borden supplied any of these with Borden labels? A. I would be drawing on a hazy memory if I could come with a reply.

Q. We don't want you to make any guesstimates.

In the course of your determination as to who you should approach for bids on the private label business of your Chicago unit, was it necessary for you to become familiar with the identity of the larger dairies in the Chicago area? A. I made no special effort to become acquainted with the size of the dairies in Chicago. I had already had some knowledge of the sizeable dairies, merely by having resided in that area for 15 years.

Q. On the basis of your observation, both as a resident and as a dairy buyer for the A&P, who in your opinion were the leading dairies in the Chicago market area in size?

Mr. White: I object, your Honor. There is no proper foundation laid for this witness. He has purchased from [1735] one company; otherwise, he is a householder.

Mr. McInerney: I object also, your Honor.

Mr. Mathias: I believe the witness' own documents and the facts in this case indicate it was necessary for him to determine who was capable of supplying the A&P volume and in this regard plus his own long experience in the market, I believe he is qualified.

Judge Hinkes: Why don't you approach it in a different vein. He testified he made certain contacts or attempted to. I think he should be asked why he selected those.

By Mr. Mathias:

Q. Mr. Schmidt, it has been noted on the record that you contacted Wanzer Dairy, Bowman Dairy, Dean Foods as well as Borden. Were there any others you mentioned? A. Hawthorn Mellody.

Q. Were these all the companies you had contacted in the course of your private label negotiations? A. These were the only ones I contacted, yes, sir.

Q. What was the basis of your selection of these particular dairies? A. It is my recollection that basically we selected those because of their capability of supplying our stores with milk. That was the basic criteria.

Judge Hinkes: Did their size indicate to you their capability?

[1736] The Witness: Yes, sir.

Judge Hinkes: Was their size the largest in the area?

The Witness: May I ask you to repeat that question.

Judge Hinkes: Was their size the largest in the area? Or were there larger ones that you did not contact?

The Witness: They were the largest in the area. There was one other area that we did not contact which I recognized as sizeable and that was the dairy called the Country Delight. Country Delight is owned by Certified Grocers and they are a wholesale cooperative. From what I recall knowing about Country Delight at that time, we could not have purchased dairy products from them because we were not an independent retailer that was buying groceries from Certified.

By Mr. Mathias:

Q. Mr. Schmidt, you have stated at various times Mr. Tarr apprised you of sales volume in connection with your purchases from the Borden Company. I show you Commission Exhibit 165A for identification and ask you if you have ever seen this document or a similar document before, just referring to the first page? A. I have no specific recollection of having seen this document, although by its very nature it is likely that I did see it.

Q. You did see similar documents that were prepared and submitted to you by Mr. Tarr during the course of your tenure as head buyer for A&P? [1737] A. These statistics here or volume figures are shown on an annual basis. Therefore, I don't have the specific recollection although it does say sales to the Great A&P Tea Company. Again I would most likely assume it was shown to me, but I don't recall it.

Q. I show you Commission Exhibit 163 for identification and ask if you can recall having seen this document pre-

viously? A. No, here again my recollection of seeing this very document back in that time slot is very vague.

Q. Do you recall, Mr. Schmidt, during this period of time 1967 through 1969 Mr. Tarr discussing with you or other Borden officials, discussing with you at various times the decline in volume of milk and dairy products purchases by the A&P Company? A. I have no recollection of any specific conversations with them on that subject. However, it was certainly common knowledge to me and I am sure to them one of the barometers of overall sales volume, of course, is dairy sales.

Q. The dairy sales were declining during this period of time in the A&P stores of the Chicago unit? A. Yes, sir.

Q. Mr. Schmidt, I now hand you Commission Exhibit 91A and B and 92A through C for identification and ask you if you can identify these documents, sir? A. Yes, sir.

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[1753] • • •

Q. Did you complete your college education, sir? A. No, I did not.

Q. And between the time that you commenced employment with A&P, and up to the time that you became the Chicago Unit buyer, in August 1964, what had been your experience in purchasing dairy products? A. I had no experience at all.

Q. Now, during your direct testimony you described various negotiations for private label milk in Chicago. Throughout these negotiations and even thereafter, did you ever discuss this private label arrangement with Mr. Herschel Smith of New York Headquarters? A. No, I did not.

Q. You were also asked in your direct testimony a number of questions about the Executive Committee of your Chicago Unit. Did that Executive Committee participate in the private label negotiations? A. No, they did not.

Q. Did they participate in reaching the decision to accept the Borden private label offer? A. No, sir.

Q. Did they participate in the decision as to the price at which private label milk would be sold out of the A&P stores? A. No, sir.

[1754] Q. I believe you told us about certain discussions you had with Mr. Tarr of the Borden Company with respect to private label milk. Did you in those discussions describe to him any formula or basis on which you wanted to receive a private label quotation? A. Yes, I did. Basically, I indicated to him that the formula should be predicated on the current cost of raw milk and should be stated in the quotation to us, and it certainly should include the other factors that would go into the final figure on a unit item basis, such as the cost of procurement, packaging, processing, delivery, overhead and profit.

Q. Now, did you ask for a breakdown of these various costs? A. No sir, I did not ask for a specific breakdown. I merely asked that they be considered and be made part of the figure.

Q. And thereafter when you requested quotations from other dairies, did you request them on the same basis? A. Yes, sir.

Q. Now, did you ever tell Mr. Tarr or anyone else from the Borden Company that you were not going to seek quotations from any other dairies, for this private label milk? A. No, I did not.

Q. I think in your direct testimony you were shown an exhibit which I believe is CX-14, containing a February, 1965 quotation from Borden for private label in their Chicago Calumet area.

Without showing you the exhibit, do you know that there [1755] was such a document? A. Yes, I recall.

Q. Now, what was your reaction to that quotation? A. Mr. McInerney, do you have reference to the first quotation which covered the Chicago Calumet area?

Q. Yes sir, in February of 1965. We can dig out the document, if you would like. A. No, I can visualize it, Mr. McInerney. However, I have no specific recollection concerning my impressions or reaction of it.

Q. Well, what did you do next, on receipt of that quotation? A. It is my recollection that I most likely discussed it with Mr. Bartels. However, my recollection in that specific area is faded.

Q. Now, that was a quotation solely for the Chicago Calumet area. Did you subsequently request a quotation on private label milk for the entire area that would be covered by the Chicago Unit? A. Yes, I did even actually ask for that kind of a quotation.

Q. And again without referring to the exhibits, unless you would prefer to do so, can you give us the approximate time when you received the quotation which would cover the entire area? A. As I recall, Mr. McInerney, that final, first quotation was delivered to me approximately May 25th.

[1756] Q. Now, do you recall when, between the February 9 quotation, and the late May quotation, you asked Borden to give you the more complete quotation for the entire area? In that range of time, approximately when would it have been? A. Again I missed the point of your question, Mr. McInerney. Would you mind repeating it?

Q. Well, I think I am only not referring to the documents, Mr. Schmidt, in order to expedite it, and I will be glad to go back and show you the documents. But I think we have seen that there was a Chicago Calumet quote. A. Right.

Q. On or about February 9, 1965, and I think you told us that there was a quotation on the other areas in the Chicago Unit, sometime in late May, I think you said May 25th of 1965. A. That is right, yes sir.

Q. Now, did you ask for the quotations for the other areas, closer to the February 9 date or the May 25th date?

A. That is my recollection that I did ask for the other areas much prior to May 25th, yes sir.

Q. And do you recall approximately how long it took to get the rest of the area's quotation? A. It is my recollection that it took too long. I can't specifically recall whether in my opinion at that time, and it is some time ago, whether it was four weeks or six weeks or eight weeks, Mr. McInerney, but it is my general recollection [1757] it took too long.

Q. Were you involved in other duties in addition to this private label negotiation at that time? A. Oh, yes.

Q. Approximately how many products would you be responsible for buying as buyer for the Chicago Unit? A. There were approximately 8,000 items, on which I had varying degrees of responsibility.

Q. Now, did you ever suggest to Borden, or anyone from Borden, how much A&P hoped to save on private label milk? A. No sir, I did not.

Q. Did you ever mention that you were hoping for annual saving to A&P of approximately half a million dollars? A. No, sir.

Q. In your direct examination you were shown an exhibit which I believe is identified as Commission Exhibit 23, which had to do with differences in costs between New York and Chicago. Do you recall that, sir? A. Yes, sir.

Q. Now, on receipt of that exhibit—I have a copy here, if there is no objection I will show it to the witness. If there is, I will be happy to have the original out.

Mr. Mathias: Which exhibit?

Mr. McInerney: Commission Exhibit 23.

Mr. Mathias: Oh, no.

[1758] *By Mr. McInerney:*

Q. This is the first part of it, sir and I believe there were in addition certain attachments concerning which you

testified. Do you recall whether when you received that, Mr. Schmidt, did you examine that in detail? A. I recall when it was presented to me at my desk, as I remember by Gordon Tarr and Joe Malone, they covered it in some detail with me at my desk. And it is my recollection that there was very little retained of what they said.

I recognized at that time my own inexperience in matters of cost of milk distribution, Chicago or New York or both, and as a consequence it made very little, little impression and was of very little value to me.

Q. Did you have any way of checking whether the figures given in that document as Borden's costs were indeed Borden's costs? A. No, I had no way of checking these figures.

Q. You were also shown a document which has been marked Commission Exhibit 41, and again in order to shorten the time I will show the witness a copy rather than digging out the original. Do you remember seeing that document, sir? A. Yes, sir.

Q. I believe you testified that the word insufficient at the lower left hand corner of that document, which I believe you described as your copy of a memorandum to Mr. Bartels, was written by you? [1759] A. Yes, sir.

Q. Now, without identifying the specific pages, what was it that accompanied that document that you have before you as a cover page which is Exhibit 41?

I would like the record to show that that is all the witness has before him. A. I would believe that the attachments to this letter were the Borden Company private label quotation and supporting papers, that they presented to me approximately July, of 1965.

Q. And do you recall what the projected savings were, that is, the savings estimated by Borden as between the Borden brand prices and the private label prices shown in that quotation, just the total number, if you recall? A. I recall that figure to be in the area of $420,000.

Q. Now, what does the word insufficient mean on that exhibit that you have before you? A. Well, basically, Mr. McInerney, this was a word that I selected for my own purposes as the word that would best describe, for me, the result of the conversation I had with Mr. Bartels concerning this document and its attachments. And to me it meant that there was not enough research study bids on which to make the final decision as to whether to go to private label milk, and if we did who the dairy would be that would get the business.

Q. Now, I believe you told us that at or about this time you [1760] did request quotations from other dairies, and that you mentioned Dean, Hawthorne Melody, Wanzer and Bowman. Now, from which of those dairies did you receive quotations for the Chicago area? A. We received a partial quotation for the South Bend area only, from Dean, and we received a full quotation for all stores in the Chicago Unit from Bowman.

Q. Do you know why Wanzer and Hawthorne Melody did not respond to your request for quotations? A. No, I do not, sir.

Q. And do you know why Dean gave an incomplete response to your request for quotation? A. No, I do not, sir.

Q. Now, you were shown yesterday, document marked Exhibit 50 which I will now give to you, and you described it as a quotation from Bowman. Will you tell us approximately when and how you received this quotation? A. I received this quotation from Mr. Frank Cannon, personally, in a visit in our office at my desk.

Q. Would you tell us what he said to you and what you said to him, as best you can recall it? A. The recollection that I would have is for the most part prompted by some notations that I have placed on the document. I recalled that I sat down at my desk, he presented this to me, and

I read it in his presence and there were several questions [1761] that I did raise that he clarified for me.

As I recall we first, or I first raised the question concerning this approximately $1 million, and as the document indicates there is an asterisk with what I put down on the lower left hand corner as an explanation of that $1 million, that it represented gross dollars at retail value.

I asked him on what basis he arrived at that $1 million. He indicated that with his previous experience in supplying A&P on a part basis, he was acquainted with our volume, and that in his opinion the figure was approximately one million, projected the whole unit.

I do recall that he indicated that that figure was not a requirement to the quotation, and as I recall we did discuss one of the attached attachments which indicated that the quotations would be applicable to all of our stores if—well, those quotations, yes, would be applicable to all of our stores, and if not the quotations would go up as we reduced the number of stores.

Q. When you refer to the attachment, are you refering to CX 50-R, Mr. Schmidt? A. Yes, I am, Mr. McInerney.

Q. Would you please continue? A. In—

> Mr. McInerney: I am sorry, would you read back the last, before I interrupted Mr. Schmidt, what he had been saying?
>
> [1762] The Reporter: I do recall that he indicated that the figure was not a requirement to the quotation, and as I recall we did discuss one of the attached attachments which indicated that the quotations would be applicable to all of our stores if —well, if those quotations, yes, would be applicable to all of our stores, and if not the quotations would go up as we reduced the number of stores.

Testimony of Elmer Schmidt

By Mr. McInerney:

Q. And in saying that, Mr. Schmidt, you were referring to Exhibit 50-R. Does that indicate other prices in the event that you gave the Bowman Company A&P's milk and dairy product business on something less than 100 percent of A&P's stores? A. Does not to me, no sir.

Q. Would you look at the fourth and fifth columns of that exhibit, and tell us if there is a quotation in the event that Bowman were to supply 70 percent and 50 percent of A&P's stores in the Chicago Unit? A. Yes, sir, there is.

Q. I am sorry, I think I interrupted you in your description of what you and Mr. Cannon said to each other at the time of the submission of this quotation. A. And you would like to have me repeat the essence of it?

Q. No, I would simply like to have you tell me what he said to you and what you said to him. A. On this matter of the quotation in the event he got all [1763] of the stores or part of the stores?

Q. If you recall anything else about that or if not on any other subject. A. Oh. I recall nothing further on this reference of approximately $1 million or Exhibit 50-R.

Judge Hinkes: Before you go on, Mr. Schmidt, on Exhibit 50-R the first column is entitled, "Standard list price to chain store."

What, if you know, does that represent?

The Witness: Your Honor, I have no recollection of analyzing the heading on that particular column at the time that Mr. Cannon was at my desk.

Judge Hinkes: Let me ask you this. The next three columns are net prices, according to the chart.

The Witness: Yes, sir.

Judge Hinkes: These are the prices quoted to you by Bowman, as your cost of the various items, is that correct?

Testimony of Elmer Schmidt

The Witness: Yes, sir.

Judge Hinkes: Now, comparing those figures with the much higher figure in the first column of list prices, would that indicate your cost of Bowman's milk, rather than private label, or would it represent your selling price? If you know.

Mr. McInerney: Your Honor, I think I can clarify that, if you will.

Judge Hinkes: Very well.

[1764] The Witness: Sorry.

By Mr. McInerney:

Q. Would you look at Exhibit 250-A, the first page of this exhibit, sir. I am sorry, Commission Exhibit 50-A. A. All right.

Q. And at the bottom of that page, or toward the bottom, rather, there is a listing of four items, the second of which contains a pencilled notation, and can you tell us whose handwriting that is? A. That slash and the word "or" is in my handwriting.

Q. And was that as a result of your conversation with Mr. Cannon? A. Yes, it was.

Q. Will you tell us what that means? A. Well, it was my interpretation as I read that subparagraph 2 in his presence, that both the Bowman label and the A&P label, might be necessary to secure the attached quotations. However, when I raised that point he indicated no, it could be the Bowman label or the A&P label, or both.

Q. And would the prices quoted to you, for example, on Commission Exhibit 50-I, if you would look at that page. A. Yes, sir.

Q. Would they be the same whether it was Bowman label or private label? A. Yes sir, that was my understanding.

Testimony of Elmer Schmidt

[1765] Q. In other words, this was a quotation of a net price to you, whether you took it as Bowman label milk or A&P label milk? A. Yes, sir.

Mr. McInerney: I don't know if that clarifies it, Your Honor.

Judge Hinkes: Yes.

By Mr. McInerney:

Q. Now, you were telling us, Mr. Schmidt, about the talk you had with Mr. Cannon of Bowman Dairy. Incidentally, did we establish who Mr. Cannon is? Can you tell us?

I am not clear whether the record indicates who Mr. Cannon is, or was at that time. A. I did not know his exact title at that time. However, I knew he was responsible for sales of the Bowman Dairy Company. I see on the document that his title was General Manager, Wholesale.

Q. And had he previously to this time in 1965 called on A&P and sold milk to A&P, the Bowman milk? A. Yes, he had, and up until the mid 50's, at which time the Bowman Dairy served approximately half of the Chicago Unit A&P stores with dairy products.

Q. And who sold approximately the other half? A. The Borden Company.

Q. And somewhere in or around that time the Bowman Company ceased to supply A&P, and the Borden Company took over most [1766] of the supply of A&P's dairy products, is that correct? A. Yes, sir.

Q. Would you please continue with what you recall about what you said to Mr. Cannon and what he said to you on the occasion of his submission of this quotation? A. I do recall that we went over this document page by page, but I don't have anything noted until we get to Exhibit, I believe that is 50-I.

Testimony of Elmer Schmidt

Q. Is that your handwriting at the bottom of 50-I? A. Yes, sir, it is.

Q. And what was the occasion for your writing that? A. I saw that word on top of column two, the word "mark up", and asked him what that included. And he indicated to me that it included overhead and profit.

Q. How much profit? A. He volunteered, approximately six percent.

Q. Do you recall anything else that was said on this occasion? A. I have no recollection, Mr. McInerney, of anything else that we discussed on that occasion, other than what I have commented on.

* * * * *

[1772] Judge Hinkes: Well, suppose you try again and see if you can have it a little clearer to the witness without any leading.

By Mr. McInerney:

Q. Can you tell us, Mr. Schmidt, when, or under what circumstances, there was first any discussion with anyone from Borden with respect to the point of revising the quotation about which you have previously testified, and to which you referred, I believe, when you were looking at Exhibit 41, which was that memorandum from you to Mr. Bartels, on which you had written "insufficient"? A. It is my recollection that certainly within several days after my conversation with Mr. Bartels that resulted in my writing the word insufficient on my file copy of that document, that I contacted the Borden Company, Gordon Tarr, specifically, and indicated to him that we were going to ask other dairies to give us a quotation on our private label milk.

And that since we were going to go to outside dairies for quotations on private label milk, and because the quotation we had received from them did have some age to it,

we would give them the opportunity of re-evaluating it, or of indicating to us that after their evaluation, it would stand as submitted.

That is the best of my recollection, Mr. McInerney.

Judge Hinkes: Mr. Schmidt, your previous testimony was to the effect that you did tell Mr. Tarr that you had other [1773] competitive bids. But you didn't tell him that you had the Bowman bid, is that correct?

Mr. McInerney: May we just get the time sequence, Your Honor?

Judge Hinkes: Yes, this was after you had received the bid from the Bowman Company. And if I understand your testimony, and correct me if I am wrong, you then told Mr. Tarr that you had other competitive bids but didn't say that you had the Bowman bid, specifically?

The Witness: That is correct, and as Mr. McInerney has hinted, there are two periods of time involved. My answer to his last question related to the conversation I had with Gordon Tarr after Mr. Bartels and I made the decision to get to other bids.

My conversation with Mr. Tarr in which I indicated to him that we had competitive bids occurred after we had received the Bowman bid, and there is a time span of approximately two to three months.

Judge Hinkes: Now, at that second occasion, which was the one I was referring to in my question, you also told Mr. Tarr something about your waiting for their revised bid, is that correct?

The Witness: Their revised bid, or an indication that the first bid should be the one that we would consider as the only bid.

[1774] Judge Hinkes: Well, isn't that the same thing that you told Mr. Tarr at the first occasion?

Mr. McInerney: I think that is the confusion, Your Honor. Well, the witness can explain it.

Judge Hinkes: A moment ago I thought you told me that on the first occasion you told Mr. Tarr that they could revise their bid or stand by it?

The Witness: That is right.

Judge Hinkes: Now, on the second occasion you told them the same thing.

The Witness: Yes sir, because we still had not received an answer from them.

Judge Hinkes: Very well.

Mr. McInerney: The only difference if I may, Your Honor—

Mr. Mathias: Your Honor, I would object to Mr. McInerney characterizing the witness' testimony.

Mr. McInerney: All right.

Mr. Mathias: The witness has testified, and Mr. McInerney's testimony is not needed on this point.

Judge Hinkes: I think I understand the witness' answer, Mr. McInerney.

By Mr. McInerney:

Q. Had there been any response from Borden, between the time that you told Mr. Tarr that A&P was going to solicit other [1775] quotations, and the conversation about which His Honor was just questioning you? In other words, had there been any word from them in the meantime as to whether they were going to let their previous quotation stand or revise it?

Mr. Mathias: Your Honor, I again object to leading the witness.

Mr. McInerney: I submit that was not a leading question, Your Honor.

Judge Hinkes: I think the witness has already

answered that in response to my question, when he said that he hadn't heard anything.

Mr. McInerney: All right, I simply wanted to clarify the matter, and if it is clarified I will drop the subject.

By Mr. McInerney:

Q. Now, as best you can recall, when and how did you first learn that Borden was going to revise the quotation it had given you sometime in the summer of 1965?

Mr. Mathias: Your Honor, I would again object to leading the witness. I don't believe there is any necessity at this point. There has been no testimony by the witness at this stage that he had learned of this intention.

I believe that Mr. McInerney's question is leading, and unnecessarily so at this point.

Mr. McInerney: Your Honor, I submit that there [1776] is no dispute here about whether or not there was a revision, and I was merely trying to expedite matters. Again I don't think it was a leading question.

I have been very restrained in making that objection to Mr. Mathias's questions, I submit—

Judge Hinkes: Well, in any event, I will allow the witness to answer. I think that you certainly are aware, Mr. McInerney, that to the extent the question may be leading, you diminish the probative value of the answer and it is to your own advantage not to employ those questions whether or not objection is made.

Mr. McInerney: Yes, Your Honor, but I did not believe it is leading. If Your Honor thinks it is leading, I will try to rephrase it. I don't think there

is any dispute about the fact there was such a revision, and I am merely trying to get when he learned about it.

Judge Hinkes: The witness will answer.

The Witness: I don't recall the specific date, but I do recall receiving a phone call from Mr. Tarr, indicating that I would receive a revised quotation. I asked him, as I recall, approximately when I would receive it. And he indicated that it would take some days to type it and put it in good order and present it to me.

And I do recall that he made the comment that the savings would be substantially increased. Now, again bear [1777] in mind that I cannot quote him directly. The general recollection I have is that he made reference to the fact that the savings would be greater than the quotation previously submitted would afford.

Of course, then the quotation was delivered. Again here my recollection is hazy, but I believe perhaps within the week.

By Mr. McInerney:

Q. Was it delivered to you, sir? A. I don't recall that specifically either, Mr. McInerney. It was delivered, certainly. The copy eventually came to my attention. A likelihood that it was delivered to my assistant at that time, or to someone else in the building, but as I say, the best of my recollection needless to say, and the evidence is there, it was given to me.

Q. Now, when your—I am sorry, go ahead. A. I also recall of course that that quotation that was delivered to me, did include a quotation on glass. Here again my recollection is hazy.

I believe that when I heard that there was glass quoted that I called Gordon Tarr again and indicated to him that

that particular item should be removed, and this then prompted the recompilation of the quotations without it.

And then of course we scheduled the appointment in Libertyville, that resulted in presentation of the final [1778] quotation.

Q. Now, just so that the record will be clear, when you spoke of a quotation that included the gallon glass—

May I have Exhibits 56 and 62?

Is this document which is marked Commission Exhibit 56-A and subsequent letters, the quotation to which you refer? A. Yes, sir.

Q. And why did you tell the Borden Company that the gallon glass quotation was not what you wanted? A. Basically we recognized, at least I did, I believe I recall that I was at that time reflecting the opinions of the Chicago Unit, members on my level of management, that we did not want to carry glass private label milk because of the problems at the store level.

Needless to say, it requires more space in the cases, you have the problem of collecting the deposit, making the refund, storing the bottles at the checkout counter, moving them to the back room, assembling them for pick up by the driver-salesman on the next visit to the store.

Basically for that reason we decided to exclude it.

Q. Does gallon glass involve any other additional expense to the retail store, in private label?

Mr. Mathias: Your Honor, I object, unless this witness is shown to be qualified to testify concerning the retail qualification.

[1779] Mr. McInerney: Well, I think there is an exhibit about this, and you have already questioned him about it, Mr. Mathias.

Mr. Mathias: Your Honor, I recall no questions put by me to Mr. Schmidt concerning costs.

Testimony of Elmer Schmidt

Mr. McInerney: May we have Commission Exhibit 66, please?

Oh, I have it. Thank you.

Mr. Mathias: Your Honor, before he asks a question, I would like to have a chance to look at this exhibit myself.

All right, fine.

By Mr. McInerney:

Q. Would you look at Commission Exhibit 66 and tell us if that refreshes your recollection as to any additional items that were considered when you decided not to take gallon glass in private label? A. Yes, it does, Mr. McInerney.

Q. Would you tell us what the additional items were? A. At that particular time glass bottles in the Chicago market area were identifiable with an imprint or a print on the glass bottle itself. Now, this imprint identified the dairy that packaged it and delivered it.

In private label, it would be required of us to have an imprinted glass bottle, that imprint bearing our logo.

Q. And who would bear the expense of the imprint of glass [1780] bottles? A. It is my recollection that this was discussed with the Borden Company, and we recognized that there would be a cost factor that we in A&P might have to share in; if not in total, in part.

Q. Now, were there any other reasons why you were not interested in gallon glass in private label at this time, as best you can recall? A. It is the best of my recollection that returnable glass, whether in milk or beverages, was being replaced in the case of dairy with paper, in the case of beverage of course, with NR bottles.

Q. All I want at this point, Mr. Schmidt, is what you discussed with the Borden Company or with Mr. Bartels as to why gallon glass was not acceptable as a private label item? A. I have no other recollection, Mr. McInerney.

Testimony of Elmer Schmidt

Q. Now, you also mentioned a second quotation or a final quotation from the Borden Company that you received in Libertyville. And again, for purposes of clarity in the record, I would like to show you Commission Exhibit 62-A, and subsequent numbers, and ask you to look at that and tell us if that is the final quotation to which you refer? A. Yes, sir, this is the final quotation.

Mr. McInerney: Your Honor, the witness has been on for well over an hour. If this is an appropriate time—

[1781] Judge Hinkes: Very well, we will take a short recess now.

(A brief recess was taken.)

[1782] Judge Hinkes: Mr. McInerney.

By Mr. McInerney:

Q. Just before the recess, Mr. Schmidt, I think you had identified Commission Exhibit 62 as the final quotation from Borden which you received at a meeting in Libertyville. First of all, can you tell us why you received it in Libertyville, rather than at your office in Chicago? A. Yes, sir. I was on vacation at that particular time. It was a time my wife was expecting our fifth child, and I recognized the urgency of finalizing the decision, and I indicated to Mr. Bartels that while I was on vacation, I would meet with the Borden Company to secure this final quotation and then submit it to him after I received it.

I recall setting this appointment up with the Borden Company for the VFW hall in Libertyville; I note by the date of the document perhaps several days after the 21st of September.

Q. Who was present at that meeting? A. Mr. Ralph Minkler and Gordon Tarr, of the Borden Company, and myself.

Testimony of Elmer Schmidt

Q. Would you tell us, please, what was said and done by the participants in that meeting? A. To the best of my recollection, we met, they presented this document and they went over it page by page; they explained some of it, I observing all of it. We discussed the matter of approximately, the approximate savings involved.

[1783] Q. Is there anything— A. I recall that I asked them for a letter indicating that these prices would be offered to others on proportionately equal terms. There was reference by them to the necessity of my saving the competitive bids. I indicated to them that we would.

As I recall, I knew that I was going to submit copies of the quotations, the so-called bids from Bowman, and this Borden bid, to Mr. Bartels, so that, of course, he would have it in his files, and I in mine. That is the sum and substance of my recollection, Mr. McInerney.

Q. You mentioned the subject—

Mr. Mathias: Your Honor, I would object to Mr. McInerney repeating the witness' testimony in phrasing his questions. I believe that in doing so, we face the risk of getting an inaccurate depiction of Mr. Schmidt's testimony and also that there is the possibility of coaching the witness.

Mr. McInerney: I don't think that there is anything improper in keeping the continuity. I think if Mr. Mathias had heard my whole question, he would have no objection. By my saying he mentioned a certain subject, and asking him if he can remember anything further with respect to that subject, this I am trying to elicit a memory of some eight years ago.

Judge Hinkes: State your question.

[1784] *By Mr. McInerney:*

Q. You mentioned that there was some discussion of the subject of the savings that would be involved. Can you

recall what the substance of that discussion was, on the subject of the savings that would be involved? A. It is my recollection that I wanted to be sure that with the removal of the quotation on glass in the previous quotation, that the savings would nevertheless be reflected in the new quotation.

Q. And was there a dollar amount mentioned as to what the savings would be on the assumption that you had the same volume as in the previous year and that you switched entirely to the private label milk and that the Borden brand prices remained the same? A. Mr. McInerney, I would like you to repeat that question, particularly the opening of it, if you can.

Q. I am inquiring as to whether there was any discussion or figure mentioned as to the total amount of the saving that A & P might expect to get by accepting this private label offer, in comparison to the Borden brand prices. If I am not making myself clear, I will be happy to rephrase that. A. I would believe, Mr. McInerney, that reference was made to those savings on the strength of the inclusion of it in the document as they presented it to me.

Q. The document presented to you, if you will note, on [1785] Commission Exhibit 62-B, mentions a figure of some $880,000. Was there a discussion of whether you would, in fact, save $880,000, if you recall? A. I have no recollection that that was discussed at this meeting, but I would have to believe that there was because of the handwritten letter that I directed to Mr. Bartels in which I make reference to a reduction in that savings because the cost of raw milk had changed from the date that the quotation was prepared for us.

Q. May the record show that I am showing the witness Exhibit 66-B, and I ask him whether the second paragraph of that page is the reference to which you have just referred? A. Yes, sir, it is. Yes, sir, it is.

Testimony of Elmer Schmidt

Q. And does that refresh your recollection as to whether there was some discussion to the effect that this $880,000 figure was not quite accurate because of an increase in the raw milk cost that would be passed along onto A & P in the private label prices, but that had been absorbed by Borden in its Borden label prices? A. I would have to conclude that this subject as shown on my letter was mentioned at the meeting, yes, sir.

Mr. Mathias: Your Honor, I would move that the answer be stricken. If he is only testifying as to what his memorandum stated at the time, I do not believe that there is any probative value in his statement.

[1786] *By Mr. McInerney:*

Q. Let me ask what your best recollection is Mr. Schmidt, now that you have looked at the memorandum? A. Mr. McInerney if I may answer you question this way: That this particular subject, and my report of this particular subject is the result of the meeting in Libertyville—

Q. Is Commission Exhibit 66, in effect, a report from you to Mr. Bartels of the meeting in Libertyville? A. Yes, sir.

Q. All right sir. You also mentioned that you requested from Borden a letter concerning proportionately equal prices. Did you report that to Mr. Bartels in your memorandum which has been marked Exhibit 66?

Mr. Mathias: Your Honor, I object to that question. The memorandum speaks for itself.

Judge Hinkes: Sustained.

By Mr. McInerney:

Q. Will you tell us, Mr. Schmidt, whether you communicated in some way to Mr. Bartels that you had requested a

letter of availability, or however you want to describe it, from the Borden Company?

Mr. Mathias: Your Honor, I object to that as a leading question.

Judge Hinkes: I will allow the witness to answer.

The Witness: Yes, I did make such a request in my [1787] communication to him dated September 28, Exhibit 66-B.

Mr. Mathias: Your Honor, I would move that the answer be stricken since the witness is only reading from CX-66-B, which is in evidence, and—

Judge Hinkes: The answer stands, in any event. It is responsive to the question as to whether he communicated with his superiors on that subject, and to that extent, it is perfectly proper. It adds nothing, however, to the state of the record.

Mr. McInerney: I think that in answer, would you read the witness' answer back, Mr. Reporter, I think there may have been a misstatement.

(The record was read by the reporter as follows:

"Question: All right, sir. You also mentioned that you requested from Borden a letter concerning proportionately equal prices. Did you report that to Mr. Bartels in your memorandum which has been marked Exhibit 66?

"Answer: Yes, I did make such a request in my communication to him dated September 28, Exhibit 66-B.")

By Mr. McInerney:

Q. Had you completed your answer, now that you have heard it read, Mr. Schmidt? A. That is not the answer I intended.

Q. Please, just give us your best recollection of whether or not you communicated to Mr. Bartels that you had made

a request [1788] of the Borden Company for a letter with respect to this offer. A. I communicated my request to the Borden Company in my note in my letter to him dated September 28.

Q. Do you recall having any conversation with Mr. Bartels with respect to this request of Borden for such a letter? A. I recall no conversation with Mr. Bartels, prior to the actual receipt of the letter.

Q. At your meeting in Libertyville, do you recall whether anything else was said about this letter from the Borden Company that you requested of Mr. Minkler and Mr. Tarr? A. It is my recollection that they indicated that such a letter would be forthcoming. But here again, I can't be more specific than that because it was eight years ago, but I believe that if there had been any, anything other than that positive indication, I am certain I would have recalled it.

Q. You also mentioned that they asked you to save the competitive offer or offers. Was there anything further said on that subject; what did you say to them with respect to that, if you can recall? A. It is my recollection that I informed them that we would, since that was part of our usual procedure.

Q. And is that, in fact, part of A & P's usual procedure? A. We keep—

Q. As far as you know? A. —We keep copies of all quotations received, Mr. [1789] McInerney.

Q. Do you recall anything else about this meeting at Libertyville at which you received this final quotation from Borden? A. No, sir, I can't recall anything else, Mr. McInerney.

Q. Apart from the reference of saving the competitive offer or offers, do you recall whether anything was said on the subject of Borden Company's competition, or meeting competition? A. I don't specifically recall if at that meeting there was reference to the phrase you used, "meeting competition," or competitive offers. But in the many con-

versations that I had with Borden, they made reference to any number of subjects. I believe I recall correctly that reference was made to meeting competition or competitive bids or competitive situations, along with what I chose to consider at best salesmen's talk.

The conversations that the Borden Company and I had on this matter of private label milk, in my opinion, were always too protracted. I loaned them an attentive ear but much of it, as I said, I considered in the area of salesmen talk.

Q. Did Mr. Minkler or Mr. Tarr attempt to explain in any way the revision that they had made? Let me ask, first, did they indicate that they were embarrassed in any way by making this revision?

Mr. Mathias: Your Honor, I believe that that is a leading question. It has been asked, but again, Mr. McInerney is putting words in the witness' mouth.

[1790] Mr. McInerney: No, I am trying to refresh his recollection, if there is a recollection to be refreshed.

Let me strike the question and just ask, in your previous answer about salesmen's talk, why did you consider it salesmen's talk?

Mr. White: I object to that, Your Honor. When he made that, he was talking about something which was unidentified as to time. He said that these things went on over a long period of time. I think the answer as to why he considered something said to him that isn't even identified as to date or its relationship to this has anything to prove or disprove in this case.

Judge Hinkes: I don't know that his reference to salesmen's talk was specifically directed to the meeting that he had in September of 1965.

Mr. McInerney: I don't know either, Your Honor.

Judge Hinkes: I think that I would have to sustain the objection.

By Mr. McInerney:

Q. Can you recall specifically, Mr. Schmidt, can you pinpoint when this reference to competition may have been made? A. I have no recollection that would pinpoint it.

Q. Whenever it was, can you tell us why you considered it salesmen's talk?

Mr. White: I object to the question.

[1791] Judge Hinkes: I am going to sustain the objection. I think we are reaching, at this point.

By Mr. McInerney:

Q. At this meeting in Libertyville, did Mr. Minkler or Mr. Tarr inquire what the price level of the competitive offer or offers that you had might have been? A. No, sir.

Q. Was there any discussion with respect to meeting or beating competition, as best you can recall?

Mr. White: I object. He has been asked and answered the question already.

Judge Hinkes: Let the witness answer. I am not sure that that specific question has been answered.

The Witness: Would you restate that question, please Mr. McInerney?

Mr. McInerney: Would you read it back, please, Mr. Reporter?

(The record was read by the Reporter as follows:

"Question: Was there any discussion with respect to meeting or beating competition, as best you can recall?")

Testimony of Elmer Schmidt

By Mr. McInerney:

Q. We are talking now about the Libertyville meeting, Mr. Schmidt. A. Yes, sir, I have it pinpointed to that date. It is my opinion—

[1792] Q. I don't think— A. I am sorry, it is my recollection that they used the phrase "meeting competition" or "beating competition" as the reason for asking me to make sure that we would save and keep in our files the competitive bids.

Q. Do you actually recall that, Mr. Schmidt, specifically?

Mr. Mathias: Your Honor, I object to that question.

Mr. White: He has just testified to it. Now, he is—

Judge Hinkes: Sustained.

By Mr. McInerney:

Q. What else was said on the subject of competitive bids, if you recall, Mr. Schmidt? A. Again, Mr. McInerney, I don't recall specifically, but as I indicated in previous testimony here, I have the feeling that during this period of time they made reference to it, but again, as I indicated, I considered it salesmen's talk. As a consequence, my memory is not sufficient to indicate when and who said it.

Mr. McInerney: I think it would be only fair if I am permitted to point out to the witness that—

Mr. Mathias: Your Honor, before he makes the statement, I would like the witness excused from the room and I would like to hear what the statement is.

Mr. McInerney: All right, would you mind, Mr. Schmidt?

[1793] The Witness: Not at all.

(The witness left the room.)

Mr. McInerney: If you would prefer, we can do it off the record.

Mr. Mathias: I would prefer it on the record.

Mr. McInerney: All right.

Judge Hinkes: All right, let's have it on the record.

Mr. McInerney: I think it is clear, Your Honor, that the witness is confused at this point. He has testified that he couldn't pinpoint any specific discussion with respect to this. And I was simply trying to wrap this up and get rid of the subject, and now he thinks he recalls something, and I am trying to find out what could possibly be the difference between what he is saying now and his reference immediately preceding that, he couldn't pinpoint any discussion with reference to this.

I think it is only fair to point out to the witness that his previous testimony was that he could not recall anything, and now he is attempting to recall something and I would like to find out exactly what it is that he recalls. And I think at this point since the witness appears to be confused, it is fair for me to ask leading questions of the witness.

Mr. Mathias: Your Honor, I believe that the witness had answered in response to repeated inquiries from Mr. [1794] McInerney concerning the September, late September meeting, that he could recall that the term "meeting competition" was used in connection with the request to save the competing bids.

I don't believe there is any ambiguity or unclarity in the record on that point. What Mr. McInerney is trying to do, he has also stated that in a number of instances, that it seems to him that he has a hazy recollection that the term "meeting competition" was

mentioned in a number of meetings with the Borden Company and to this effect.

What Mr. McInerney is trying to do is to attack one statement elicited by him of what I consider to be his own witness, and I believe that it is manifestly improper to allow him to continue and harp and hit at this point. The witness' testimony is clear; there is no ambiguity in the witness' testimony.

Mr. McInerney: Your Honor, I think it is far from clear. I think that we went through this and he said many times that he could not recall any specific occasion.

Judge Hinkes: That is true, but his most recent utterance was that he did remember this mention of meeting competition or beating competition.

And he did say that this was in connection with their request to him that he save the competitive bids.

Mr. McInerney: If your Honor—I am sorry.

Judge Hinkes: You may make your argument on the state of his recollection and you may also explore further what [1795] else he may remember but it is not at all unusual for a witness to have a hazy memory and then the more he thinks about it, to recollect a detail here or a detail there.

That is not at all inconsistent, and I don't think that we have to belabor that issue. If you wish to explore the issue further, you may, with the witness. But I don't think you can ask him to explain why he remembers now that he didn't remember earlier. I don't think that is going to be productive of any valuable answer.

Mr. McInerney: I don't know whether it will or not, Your Honor, I have no way of knowing, and all I am trying to do is get at what the facts are.

Judge Hinkes: He has told us what the facts are. These are now the facts as he states them.

Mr. McInerney: If you will recall, Your Honor, he prefaced that with the statement that "in my opinion," something or other. I don't remember what it was. And I am trying to show the state of his recollection is unclear. I am trying to establish that as best I can do.

I don't think that Mr. Mathias' statement that the record is clear—I agree with that to the extent that it is clear that he could not remember any reference to meeting competition.

Judge Hinkes: I think that all you can be permitted [1796] at this point is to ask him once again this is what he recollects, what he has just testified to. If you are not sure that that is the nature of his testimony, you may ask him that. But I think the record will demonstrate that he did say when he was stopped from giving an opinion that his best recollection was thus and so.

If you wish to, once again, ask him whether that is his best recollection, I think that is entirely permissible, but I don't think we should go into that any further.

Mr. McInerney: Your Honor, I have several questions I wish to ask him on this line.

Judge Hinkes: We can only deal with them one at a time. I mean, as far as your pending question is concerned, I don't think that is appropriate.

Mr. McInerney: Very well, Your Honor.

Judge Hinkes: We will call the witness back in.

(The witness re-enters the room and resumes the stand.)

Judge Hinkes: You may continue, Mr. McInerney.

Testimony of Elmer Schmidt

By Mr. McInerney:

Q. Mr. Schmidt, did you ever report to Mr. Bartels or anyone at A&P that any reference had been made in your conversation with Mr. Minkler and Mr. Tarr to meeting competition? A. No, sir, I did not.

Q. In your written report, which is Commission Exhibit 66, [1797] is there any reference to it in that report?

Mr. White: I object.

Mr. Mathias: I object to it, Your Honor. The record speaks for itself.

Judge Hinkes: Sustained.

By Mr. McInerney:

Q. Is there any document or other thing that might refresh your recollection with respect to whether or not the subject of meeting competition was mentioned at this Libertyville meeting? A. No.

Mr. Mathias: I object to the form of the question, Your Honor. If there is any document, let Counsel come forward with it.

Judge Hinkes: I don't know that the need for refreshing his recollection has been established, Mr. McInerney. You might first ask him whether he does recollect, or whether he has some difficulty in recollecting that subject matter, and then explore it.

By Mr. McInerney:

Q. Do you have difficulty, Mr. Schmidt, in reconstructing what was said at this Libertyville meeting, with respect to meeting competition? A. Absolutely.

* * * * *

Testimony of Elmer Schmidt

[1805] * * *

Mr. McInerney: I don't think there is any reason at this stage to curtail my examination in that manner.

Judge Hinkes: In any event, I don't know what the next question will be. But if there is any objection, I will make my ruling at an appropriate time. In any event, I don't see there is any reason for excluding the witness any longer; but it is 12 o'clock.

Mr. Mathias: Your Honor, could we go just a few minutes to see if this line of questioning is exhausted; either that, or I would like a ruling Mr. Schmidt may not consult with A & P Counsel over the lunch time.

Judge Hinkes: Very well. Let's call Mr. Schmidt back in.

(The witness re-entered the room, resumed the stand.)

Judge Hinkes: Mr. McInerney.

By Mr. McInerney:

Q. Mr. Schmidt, I believe you have testified that you did not report to Mr. Bartels or anyone at A & P that the subject of meeting or beating competition had been discussed between you and anyone at the Borden Company.

My question is, can you tell us why you would not have [1806] reported that?

Mr. Mathias: I object to the form of the question, "why you would not have reported."

Judge Hinkes: "Why you did not."

Mr. McInerney: All right, sir.

The Witness: I did not attach any importance to their statement to me. The reason I didn't consider

it important is because I considered it as their reason for asking me to keep the bids and that basically the letter that I had requested indicating that the offer would be made on proportionately equal terms, was the only requirement that we would need to accept the quotations as submitted to us.

By Mr. McInerney:

Q. Can you recall any other reason why you did not report any such subject to anyone at A & P, if you can recall? A. It is only through this kind of interrogation, Mr. McInerney, that I suddenly become aware of the apparent importance of this statement. I certainly under no circumstances knew the significance of it at the Libertyville meeting, or in subsequent months and years.

Mr. White: Your Honor, I move to strike the answer as not responsive to the question.

Mr. McInerney: No, I think it is.

Judge Hinkes: Whether the answer is responsive or not is something for Mr. McInerney.

[1807] Mr. White: That is the basis for my late objection, Your Honor, and on the ground that the testimony itself is incompetent and does not tend to prove or disprove any issues.

Mr. McInerney: I think that goes to the—

Judge Hinkes: In any event, the witness' answer will stand.

As I understand what you are saying, Mr. Schmidt, at the time you didn't think it was important; now you think that it appears to be important?

The Witness: Yes, sir.

Mr. McInerney: I think this is a good hour for our recess.

Judge Hinkes: We can recess at this time.

Mr. Mathias: Your Honor, I think I would like to ask Mr. McInerney if he intends to ask any further questions along this line after the luncheon period.

Mr. McInerney: I don't have any intention, Your Honor. At present; if I do, I will advise you before in the absence of the witness.

Mr. Mathias: Your Honor, my point is if this point is to be perused at any great detail after the luncheon period, then I believe that the witness and Mr. McInerney should not go to lunch together and confer together over the luncheon period.

Mr. McInerney: Your Honor, I think I can represent to you that I have finished, to the best of my knowledge, the [1808] subject of the Libertyville meeting.

Judge Hinkes: Let me put it this way to you, Mr. Schmidt. I will ask you not to discuss your testimony with anyone, particularly with respect to this matter of meeting or beating competition in the September 1965, meeting at Libertyville.

And I want you not to discuss that with anyone during this lunch period that we are going to take now.

And I will ask you, Mr. McInerney, to observe the same restriction.

Mr. McInerney: Yes, Your Honor.

The Witness: Yes, Your Honor, I will.

Mr. McInerney: That does not mean, however, Your Honor, I cannot show the witness documents with respect to other subjects and interpret them in order to expedite the testimony.

Judge Hinkes: As long as it does not have anything to do with this subject of meeting or beating competition, and whether it was discussed or why

it was discussed, and why it was not discussed during the September, 1965, meeting at Libertyville.

Mr. McInerney: I understand, Your Honor.

Judge Hinkes: Very well.

The Witness: I understand too.

Judge Hinkes: We will be in recess until 1:30 p.m.

(Whereupon, at 12:10 p.m. a recess was taken until 1:30 p.m. the same day.)

[1809] AFTERNOON SESSION

1:30 p.m.

Judge Hinkes: The hearing will be in order. Mr. McInerney.

ELMER R. SCHMIDT resumed the stand and testified further as follows:

Cross Examination by Mr. McInerney (Resumed):

Q. During the Noon recess, Mr. Schmidt, did we discuss the Woodstock meeting or any other aspect of your testimony? A. No, we did not.

Q. I am sorry I misspoke myself, the Libertyville meeting, did we discuss that? A. No, we did not.

Q. Did we discuss any aspect of your testimony? A. None whatsoever, Mr. McInerney.

Q. Did I show you any documents? A. No, you did not.

Q. Sir, just before the recess, you had requested a letter from the Borden representatives, at the time that they submitted what we have been calling their final quotation, which is Commission Exhibit 62. Did you receive such a letter? A. Yes, sir, I did.

Q. Showing you what has been marked Respondent A & P's [1810] Exhibit 2, would you tell us what that is?

A. This was the letter that was given or transmitted to me in compliance, with my request.

Q. And on receipt of that letter, what did you understand it to constitute?

Mr. Mathias: Your Honor, I object to any characterization by this witness as to what this letter constitutes. The letter speaks for itself. It is in evidence.

Judge Hinkes: I don't think we would want to consider this witness' understanding except to the extent that it influenced any later action on his part, if that is the case.

By Mr. McInerney:

Q. Did you believe, sir, that the letter that you have in your hand was compliance with the request that you had made at the meeting in Libertyville? A. Yes, sir.

Mr. Mathias: Your Honor, I object to the question, that it is a leading question, and unnecessarily so. It calls for a specific condition inclusion by the witness, and I believe that on this area of the negotiations that Mr. McInerney should restrict himself to a proper examination of the witness.

Mr. McInerney: It was objected when I asked him what it did constitute, and now it is objected to when I make the question more specific. I don't quite understand.

Judge Hinkes: I will overrule the objection. Did [1811] you get the answer of the witness?

(The record was read by the Reporter as follows: "Answer: Yes, sir.")

Testimony of Elmer Schmidt

By Mr. McInerney:

Q. And what did you do with that letter, Mr. Schmidt? A. It was transmitted to Mr. Bartels' offices.

Q. Did Mr. Tarr or anyone from Borden, during the course of your negotiations with them on private label milk, ever indicate to you that the prices that A&P was being quoted would not be made available to others? A. No, they did not.

Q. Did they indicate to you that the Borden quotation was not cost-justified? A. I do not recall that they said that.

Q. When you received that quotation and the letter that you have already testified to, that you passed it along to Mr. Bartels, A & P Exhibit 2, how did you send them to Mr. Bartels, do you recall? A. I do not specifically recall how that was transmitted to Mr. Bartels.

Q. I would like to show you an exhibit in evidence as Commission Exhibit 263-A, and ask you to look at it and see if that helps to refresh your recollection as to what it was you transmitted to Mr. Bartels? A. I notice that in this particular document that Mr. Bartels [1812] forwarded to Mr. Smith, the letter of Mr. Tarr dated October 1 in reference to my request, is attached.

Q. Do you have a letter that will identify that?

Judge Hinkes: 263—

Mr. McInerney: Is it H?

Judge Hinkes: It looks like it could be H. It is rather blurred, that is all I can say.

Mr. McInerney: Thank you, Your Honor.

Mr. Mathias: It is "H", sir.

Judge Hinkes: Very well.

Testimony of Elmer Schmidt

By Mr. McInerney:

Q. Apart from the cover page, which is indicated as Commission Exhibit 263-A, would you tell us whether the rest of that Exhibit, all of the subsequent pages, were what you transmitted to Mr. Bartels, as best you recall? A. Yes, it is my recollection that I transmitted everything except that first page to Mr. Bartels.

Q. When you did that, do you recall what your state of mind was with respect to whether the Borden quotation was cost justified? In other words, Mr. Schmidt, if I may define what I mean by that, just for purposes of clarity, that the reduced prices to A & P reflected savings in cost to Borden, in the quantities and methods of delivery by which they would be supplying private label milk to A & P from their Woodstock plant?

Mr. Mathias: Your Honor, I am going to object to that [1813] question. There has been no foundation laid for that question.

Mr. McInerney: The purpose of the question, I think it goes to the good faith of the witness and the Company in reviewing this quotation, Your Honor. I don't think any foundation needs to be laid for it.

Judge Hinkes: It seems to me that the question should be answered. I am not at all sure that this witness' understanding would be particularly pertinent, but nevertheless, I will allow it.

The Witness: It is my recollection that I believed that this quotation was given to us on cost justification, that through the reduction of services of one kind and another to our stores, with the operation of that new Woodstock plant, which I understood to be one of the most modern, if not the most modern in the world at that time, that the opportunities of saving monies were there for the Borden Company.

Testimony of Elmer Schmidt

By Mr. McInerney:

Q. Was the efficiency of the Woodstock plant a matter that you discussed with representatives of the Borden Company prior to the submission of this quotation? A. It was discussed in general terms. They were extremely proud of it, needless to say. I personally recall riding past their old North Tripp Avenue plant twice a day on the commuting train. I observed the condition of that plant and could visualize and appreciate the improvements in processing, handling [1814] milk through a modern plant such as Woodstock.

Q. Do you recall whether the subject of palletization of milk deliveries was discussed by representatives of the Borden Company prior to the submission of this quotation? A. I was aware that palletization of milk was in use at Woodstock. I do not specifically recall, however, that it became part of this request or presentation of their quotations, Mr. McInerney.

Q. Sir, when you transmitted these quotations to Mr. Bartels, what was your recommendation or your opinion with respect to the relative merits of the Bowman bid vis-à-vis the Bowman bid?

> Mr. Mathias: Your Honor, I object to the question. I think the documents speak for themselves and any transmittal letters or memos.
>
> Judge Hinkes: The documents may speak for themselves, but that doesn't necessarily reflect the attitude of the Company involved.
>
> I will allow the answer.
>
> The Witness: Mr. McInerney, it is my recollection that I considered the Borden bid to be a better bid than the Bowman bid.

Testimony of Elmer Schmidt

By Mr. McInerney:

Q. Sir, at that time, did you examine these quotations in great detail, and analyze them in great detail? A. I did not examine them in the detail at that time that I [1815] have since that time, and the examination since that time, of course, has been most recent.

Q. Have you examined the two together recently, at my request? A. Yes, I have, Mr. McInerney.

Q. And what is the result of that examination? A. Basically, I find that the Bowman Dairy quotation was predicated on a higher cost of raw milk, and a higher butterfat content. And that the Borden Company quotation, of course, was at a different level, and no consideration was given to the distinction.

And that basically if the Bowman Company had—Bowman Company's quotation had been constructed to the same levels of butterfat content and to the base cost of raw milk, that the net result would have been a more—it would have resulted in a quotation from the Bowman Company that would have very closely, very closely, approximated the Borden bid.

Q. Would the unit cost of the quart, half-gallon and gallon in the Chicago-Calumet area, in the Bowman bid, with the adjustments to which you have referred, have been lower or higher than the unit cost for those items that the Borden quotation shows? A. The Bowman quotation on quarts, half-gallons and gallons of Homo milk would have been lower from the Bowman Company.

Mr. McInerney: Would you read that answer back, please?

(The record was read by the Reporter as follows: [1816] "Answer: The Bowman quotation on quarts, half-gallons and gallons of Homo milk would have been lower from the Bowman Company.")

The Witness: I erred, then. It should have been answered that the quotation on quarts, half-gallons and gallons, adjusted, would have been lower from the Bowman Dairy Company.

Judge Hinkes: Than Borden?

The Witness: Than Borden, yes, sir.

By Mr. McInerney:

Q. And I believe that you told us that the Bowman quotation was for either private label or Bowman label. A. Yes, sir, that is correct, and basically we overlooked that aspect in recommending to the Divisional Office, Mr. Bartels, that we purchase private label from the Borden Company.

Q. Sir, do you have before you Commission Exhibit 56 for identification?

Pardon me, in evidence. If you do not, I will give you a copy of it.

Looking at Commission Exhibit 56 for identification, does that give a quotation for brand label milk in the gallon jug? A. Yes, it does.

Q. And would you compare that quotation for brand label milk in the gallon jug with the quotation that the Bowman Dairy gave you?

Mr. Mathias: Your Honor, I would object to this [1817] witness making a comparison between two exhibits in evidence.

Mr. McInerney: Your Honor, I think I can shorten this, if you like. I think there is no problem with his looking at these. I am trying to make sense out out of the documents because there are hundreds of pages here, and I am trying to ask the witness, basically, to compare the two quotations.

And I think that, as a matter of fact, let me try it without the documents, if that is what the objection is.

By Mr. McInerney:

Q. Mr. Schmidt, have you at my request compared the Borden quotation for brand label milk in the gallon jug, with the Bowman quotation, for brand label or private label milk in the gallon jug? A. Yes, I have. I—

Mr. Mathias: Your Honor, I object. The item that is being discussed now was not even included in the negotiations. Mr. Schmidt has previously testified that the glass gallon jug was eliminated from the negotiations and from the final offer herein, because they did not want the gallon jug in the private label.

Mr. McInerney: The quotation from the Bowman Company includes a quotation on the gallon jug, and that is what was compared with the quotation from the Borden Company. Previously, the Borden Company had quoted the brand label price on the gallon jug. A & P was currently paying that price on the gallon [1818] jug from Borden and I submit it is obviously relevant.

Judge Hinkes: Did not both Companies also quote at that time a price on the gallon containers not in the jug?

Mr. McInerney: Yes, sir, but what I am getting to is a comparison between the glass gallon jug, in the Bowman quotation, vis-à-vis, what A&P was paying Borden for its glass gallon jug, which it was purchasing from Borden at that very time, in order to compare the two quotations, and the savings that might result.

Judge Hinkes: Very well; you may continue.

Testimony of Elmer Schmidt

By Mr. McInerney:

Q. What was the result of your comparison of the Bowman quotation on the glass gallon jug, and the Borden prices being charged to you for the glass gallon jug at that time? A. The Bowman quotation was ten cents-plus, a gallon cheaper.

Q. And approximately what was the order of magnitude of the A & P's purchases of the glass gallon jug from Borden at that time? A. On an annual basis, approximately one million gallons.

Q. And from that, what would you conclude would have been the cost saving to A & P from acceptance of the Bowman quotation on the glass gallon jug?

Mr. Mathias: Your Honor, I object to this line of questioning. The Exhibits are here, the pricing is here, it is all in evidence. It has been stated by the witness that the [1819] glass gallon jugs were specifically excluded from the final quotations on private label, at Mr. Schmidt's own request. I don't see relevancy of this line of questioning at all.

Mr. McInerney: Your Honor, that is a matter for argument later on.

Judge Hinkes: Mr. McInerney, is there any necessity for the witness reading the document to me? Can't that be done by me and presumably in your argument you make in your brief, in which you will specify the matter you are referring to in the documents?

Mr. McInerney: Your Honor, he is not reading now. He has already made a comparison and I think he had given us a comparison from which the arithmetic necessarily follows.

Judge Hinkes: I understand.

Mr. McInerney: And I think Mr. Mathias is impeding the examination by not letting the witness complete his answer to the question.

Judge Hinkes: Let me put it this way, Mr. McInerney, I do not wish to have any witness simply tell me his mathematical calculations on a document which I can determine for myself.

Mr. McInerney: Your Honor, I think it goes beyond that. The witness is, I have asked the witness and he has testified that I have, to compare what he was paying, what A & P was paying Borden for the glass gallon jug with what the Borden offer was on the glass gallon jug.

[1820] He has stated they made the comparison, and that it showed ten cents-plus per gallon, and that the purchases were approximately a million gallons per year. I am simply asking what the saving would have been to A & P by reason of that fact alone. I don't see that there should be much argument about it.

Judge Hinkes: Very well, go on. I just don't think there is much point in pursuing that line of inquiry if it is ascertainable by others independently of this witness. That is all. But you may continue.

Mr. McInerney: Thank you. I thought it would be really quicker at this point, Your Honor, if we could just put this figure in the record at this point.

By Mr. McInerney:

Q. Did you tell us, Mr. Schmidt, what the savings would have been from A & P from accepting the Bowman quote on the glass gallon jug? A. That saving would have approximated $100,000 a year.

Q. Thank you. On that one item alone? A. Yes, sir.

Q. Sir, in your direct testimony, I believe that you men-

tioned that Mr. Gose of the Borden Company at one point in time told you that Borden was supplying private label milk to a customer by the name of Eagle Stores. Is that correct? A. That is my recollection, Mr. McInerney.

Q. And what is it that you recollect about that, what causes [1821] you to recollect that? A. It is my recollection that Mr. Gose came in one day with a lower quotation on private label milk, for our stores in the Waukegan, Northern Illinois section, and he indicated that these prices were being lowered to us because they had acquired a private label business at the Eagle chain.

Q. Where did the Eagle chain operate? A. Their headquarters basically were in Milan, Iowa, a suburb of the Quad City general area. They have stores in Iowa and in the Northern section of Illinois, Rockford and as far East as Waukegan.

Q. And was the reduction to A & P only in those areas where Borden was supplying private label milk to A & P and the Eagle stores were also operating? A. That is my recollection, yes, sir.

Q. And was this a reduction that was not solicited by you in any way? A. That is right.

Q. Apart from receiving information such as this from Mr. Gose, do you recall any other instance that led you to believe that you were paying Borden more for private label milk than other people were paying for their milk, if you recall? A. Would you mind restating that question, Mr. McInerney, please?

Q. Yes, sir. After the private label arrangement went into [1822] effect, and Borden was supplying private label to A & P, apart from this incident with respect to the Eagle stores, did anything else happen that you can now recall that led you to believe that you were not getting the best possible price from the Borden Company? A. They would be in the area of speculation, Mr. McInerney. Nothing specific that I can recall.

Testimony of Elmer Schmidt

Q. Do you recall any conversations with a Mr. James McMahon?

Mr. Mathias: Your Honor, I believe that if this is probing the witness' area of speculation, that it would be objectionable.

Mr. McInerney: It is an attempt to refresh his memory. If it cannot be refreshed, I will drop the subject.

Judge Hinkes: You may continue.

The Witness: I do recall having conversations with Mr. McMahon, yes sir.

By Mr. McInerney:

Q. And does that help to refresh your recollection as to whether there might have been lower prices obtainable, than you were paying Borden for private label milk? A. He intimated to me that in his opinion—

Mr. Mathias: Your Honor, I am going to have to object to this line of questioning. There has been no identification of Mr. McMahon, what the circumstances of this conversation were.

• • • • •

[1826] Judge Hinkes: Be that as it may, I don't think this witness again is in a position to tell us what the contract provides. The contract is in evidence now, and you may make your argument from the contract one way or the other. I don't think this witness, however, is in a position to tell me what the contract means.

Mr. McInerney: Your Honor, I think, again you can, if the Commission Counsel persist in saying that the document speaks for itself, and we have to keep referring back to the document, I am afraid

we are going to lose some of the continuity of the testimony.

I would like to ask the witness, apart from the document.

By Mr. McInerney:

Q. Can you tell us whether it was customary for dairies to adjust the butterfat contents of their products at the request of a customer, such as A & P?

Mr. Mathias: Your Honor, I object. There has been no foundation laid for this question at all. As a matter of fact, on direct, and cross-examinations by Mr. McInerney, this witness has stated that he was not an expert in dairy matters.

Judge Hinkes: Be that as it may, I will allow the witness to answer. If you know, Mr. Schmidt.

The Witness: If I know? If I knew then?

[1827] *By Mr. McInerney:*

Q. If you know now, is what I was asking. A. If I know now?

Yes, sir.

Q. And your answer to the question is? A. Yes.

Q. Thank you. This proposal, Commission Exhibit 94, from the Dean Milk Company, also indicates that by developing a preordering system at the store level, further savings would result of a little over three mills per point.

In analyzing this proposal, did you make the adjustment in butterfat content, and in the preordering savings in comparing what the prices were that Dean was quoting as against the prices that the Borden Company was quoting you?

Did you make that comparison at the time that you received this Exhibit? A. (No response.)

Q. If you would like to look— A. It is my recollection, Mr. McInerney, that I did make such a comparison, and I do recall having seen a document which was a copy of that worksheet.

Mr. McInerney: May we see Commission Exhibit 95? I have it here.

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[1841] *By Mr. McInerney:*

Q. Would you like the question reread or restated? A. Yes, please.

Q. Do you know whether it was public knowledge what dairies such as Borden would charge chain store customers, including any discounts, in other words, what the net price would have been? A. No, I did not know.

Q. You did not know the prices, or, in other words, what I am asking you is: do you know whether or not the dairies' prices to the chains in general were common knowledge, but what net prices the dairies charge chains? A. That was not common knowledge.

Q. And did you personally have such knowledge? A. No, I did not.

Q. Now, sir, you were shown on your direct examination Commission Exhibit 102, and at that time I tried to ask you something with respect to certain markings at the bottom of it. Again I would like to get a copy that has no other notations.

Judge Hinkes: You may use this one, if you like.

Mr. McInerney: Thank you, sir.

By Mr. McInerney:

Q. Would you look at Commission Exhibit 102B, if you please. A. Yes, sir.

[1842] Q. I think you testified that the handwriting at

the bottom of that page was yours, the handwriting that concludes "can be substantiated". A. Yes, sir.

Q. Now, where did you get the information that this could be substantiated? A. It is my recollection that I received that information from Mr. Gose.

Q. And did you simply write down what Mr. Gose told you, or were you able to substantiate it some way yourself? A. No, I merely wrote down what Mr. Gose had indicated.

Q. Now, can you tell us in this private label arrangement with Borden, I think you testified that at one point there were some Iowa stores of A&P that might have been served with private label by Borden, but that they were stricken out. Do you recall that yesterday? A. Yes, sir.

Q. Now, my question is: was all of Iowa eventually excluded from this private label arrangement? A. Yes, sir.

Q. Now, in the course of these negotiations, or otherwise, did you or did anyone from A&P in your presence ever discuss with anyone from Borden the retail price at which A&P would sell private label milk or other products out of A&P stores? A. No, sir, they did not.

[1843] Mr. McInerney: May we have a short recess, Your Honor?

Judge Hinkes: Very well. Take a short recess at this time.

(Brief recess.)

Mr. McInerney: We have no further questions.

Judge Hinkes: Mr. White.

By Mr. White:

Q. Mr. Schmidt, I believe during the course of your testimony for the last approximately two days you mentioned that during the negotiations with Borden concern

ing the private label that you dealt with Gordon Tarr, Ralph Minkler and Joseph Malone. Is that correct? A. Yes, sir.

Q. Not all at the same time, but at one time or another? A. Yes, sir.

Q. In your dealings with Gordon Tarr, did you find him to be honest and forthright? A. Yes, I did.

Q. Would the same be true of Mr. Minkler? A. Yes, sir.

Q. And Mr. Malone? A. Yes, sir.

* * * * *

[1850] * * *

Q. Is that the only meeting that you had with Mr. Minkler that related to the private label negotiations? A. That is the only meeting with Mr. Minkler that I can specifically recall.

I do have a general recollection that Mr. Minkler was at my desk on several other occasions. I believe that he could have been at my desk with Mr. Malone and Mr. Tarr when that Chicago-New York comparison was given to me.

Q. I see. And he might have met with you on other occasions? A. He might have been there, yes, sir.

Q. When Borden made price changes in milk products sold to A&P, were you notified of those price changes? A. Yes, sir.

Q. And was that notification given to you normally by Gordon Tarr? A. Yes, sir, and then later by Mr. Gose.

Q. Mr. Schmidt, I show you a group of documents marked Commission Exhibit 153 and ask you if those are price change notices of the type that were delivered to you from time to time by Mr. Tarr or Mr. Gose or others from Borden. A. Yes, sir. This is the type of form that they used in bringing us price changes.

Q. Mr. Schmidt, you stated that at the conference with Mr. Minkler and Mr. Tarr in Libertyville in late Septem-

ber of [1851] 1965 that you at that time requested Borden to supply a letter concerning the availability of pricing. Do you recall your testimony in that regard? A. Yes, sir.

Q. Are you quite certain that that transpired at that meeting, or could that have happened on another occasion? A. I believe that it transpired at that meeting, Mr. White.

Mr. White: Thank you.

That is all.

Judge Hinkes: Mr. Mathias.

Mr. Mathias: No redirect, Your Honor.

Judge Hinkes: Any further examination, Mr. McInerney?

Mr. McInerney: No, Your Honor.

Judge Hinkes: Thank you, Mr. Schmidt. You may step down.

The Witness: Thank you.

(Witness excused.)

* * * * *

Testimony of Ira Bartels

July 10-11, 1973

* * * * *

[1853] Q. Are you retired? A. Yes, sir.

Q. And what was the place of your last employment, sir? A. Chicago, Illinois.

Q. And with what company, sir? A. Great Atlantic and Pacific Tea Company.

Q. And are you on a retirement pension from that concern? A. Paid for by the concern. The annuity policy is from the Prudential Insurance Company.

Q. When were you last employed by A&P, sir, in Chicago? A. Well, I left the office on April 17th, 1970.

Q. And just prior to leaving in April of 1970, what was your position with the A&P Company? A. I was Purchasing Manager of the Chicago Division.

Q. And how long did you hold that position, sir? A. From beginning the previous March, about 13 months.

Q. That would be March 1969? A. March 1969. March 1st, 1969.

Q. And prior to March 1st, 1969, what had been your position with the A&P Company, if any? A. From 1964 until the end of February 1969 I was Director of Purchases, of the Middle Western Division.

Q. I think Mr. Schmidt has already testified that approximately this period of time, in 1969, that there was a change in the divisional setup in A&P, and I take it that as of [1854] March 1st, 1969, the Middle Western Division was dissolved and what had been the Chicago Unit now became the Chicago Division. Is that correct, sir? A. That is correct.

Q. And do you recall what month in 1964 you became the Director of Purchases for the Middle Western Division, sir? A. I believe it was the latter part of August.

Q. August of 1964? A. August or the early part of September.

Testimony of Ira Bartels

Q. Now, prior to becoming the Director of Purchases for the Middle Western Division in August or September of 1964, had you been employed by the A&P Company? A. Yes, sir.

Q. And what was your position prior to that time, sir? A. I was Unit Buyer in the Chicago Unit, as the terminology existed at that time.

Q. And how long had you held that position, sir? A. From December of 1960.

Q. And I take it this was the position that was later occupied by Mr. Elmer Schmidt after you became Director of Purchases of the Division. A. That is correct.

Q. Now, as Unit Buyer, were you the head of purchases for the Chicago Unit during this period from 1960? A. Yes, sir.

* * * * *

[1862] Q. Was that prior to or subsequent to this message, sir? A. I believe it was the next morning.

Q. And what was the nature of that conversation, sir? A. Well, I wanted to be sure I understood what he was talking about, and other than this particular message. And basically that was about it. I may have at this time expressed my opinion that I thought it might be too early to generally go out and solicit bids because we as yet didn't know whether we wanted or—or as I understood it the Chicago Unit hadn't actually decided whether they wanted private label milk.

Q. Had you at any time prior to this occasion discussed the question of private label milk for the Chicago Unit or the other Units under your control with Mr. Smith? A. Yes.

Q. On what occasion was that, sir? A. I believe at a meeting in New York, along about November or December, I believe it was one of the topics that were discussed.

Q. This was November or December of 1964, sir? A. That's right.

Q. And in what manner was this discussed at that meeting? A. Well, as I recall it, I think he had information on the arrangement he had made for private label milk, I believe in New York, or not he had made but somebody had made, I believe in New York, and it was a suggestion that perhaps all [1863] Purchasing Directors should look into it for their particular areas.

Q. And did he provide you with information for your consideration concerning the nature of the private label arrangement in New York? A. Yes. I can't recall whether it was at that meeting or subsequently.

Q. And was there any discussion of private label programs that A&P Units in other parts of the country might have had in effect, at this meeting? A. No, frankly, I don't recall any.

The one sticks in my mind, though, but I don't recall whether there was any on the others or not. There may have been some comments from some of the other Purchasing Directors, but I can't recall.

[1864] Q. Now, at the time that you did obtain some information from him concerning the New York private label arrangement, whether that was at this November-December meeting or at a later date, just what did Mr. Smith supply to you? A. Well, as I remember, he supplied what he mentioned was a reasonable formula in the pricing of private label, which was two cents for processing and delivery, two cents for cartons, and two cents for overhead and profit, on a per-quart basis.

Q. And this was based upon New York— A. That is a rough approximation, evidently, but he said he found that to be sort of a benchmark.

Q. And did he provide you with a copy of the arrangement which was in existence in New York? A. I don't recall that he did. I don't believe so.

Q. Was Mr. Smith's approval necessary in order for the people in the Chicago Unit to seek to change to private

label? A. His approval would have been his or through him. Who actually approved it in New York, I don't know. But it would have had to have their, New York's, approval to make the change.

Q. Now, when you reported to New York on a milk and dairy matter, who did you report to? A. Herschel Smith.

Q. Now, Mr. Bartels, do you recall when the first contacts were made in the Chicago area, for the supply of private label milk? [1865] A. I believe it was in early February, before the 15th of February, 1965.

Q. That was shortly after this message from Mr. Smith? A. That is right, yes.

Q. And who was involved in these contacts? A. Mr. Schmidt.

Q. Now, generally speaking, throughout the course of the negotiations, who handled the negotiations between A&P and whatever, and whatever dairies were contacted concerning the supply of private labels. A. Mr. Schmidt.

Q. And for the record's sake, when you speak of Mr. Schmidt, you are talking of, S-c-h-m-i-d-t, rather than the first? A. Well, I should say Elmer Schmidt.

Q. Elmer? A. Maybe I should use the first name.

Q. Now, during the course of the negotiations, did Mr. Smith, or did Mr. Schmidt, rather, Elmer Schmidt, report to you upon the developments as they occurred in the course of the negotiations? A. Yes, or within a short time after he had had an opportunity to analyze them.

Q. But you were kept informed as to the developments in the course of the negotiations? A. Well, I was informed as to the progress, not necessarily [1866] all conversations or developments, but he would tell me when he got a quotation and he would tell me what he didn't get in it, and that type of thing.

Q. Did you have frequent meetings with Mr. Schmidt during the period February, 1965, concerning the course and conduct of the negotiations? A. Well, they were not

meetings, actually. They were when he might tell me that well, I still don't have this or I got this today, and I will pass it on to you tomorrow or the next day or something of that nature.

It was not where we sat down and talked about it. I mean, after all, we are in the same building on the same floor and probably 30 feet apart from one another.

Q. You were in very close proximity to each other? A. That's right. Maybe 30 feet is too short; maybe I should have said 70 or 80 feet.

Q. In fact, you were in daily contact with one another? A. Yes. In fact, to go to the washroom, I had to walk past his department.

Q. Mr. Bartels, I hand you Commission Exhibit 23 A through I, 24 A through F—or 24 A through G; 25 A, 26, 27, and 28 and ask you if you have seen these documents before, sir. A. 23 A, B, C, D, E, F, G, H, and I, I have seen that one before.

Q. And was this presented to you, Mr. Bartels, by Borden [1867] personnel? A. Yes.

Q. And do you recall which Borden officials presented it to you, sir? A. Well, there was Mr. Malone, and I believe Mr. Minkler. I am sure Mr. Minkler was there, but I am not quite sure whether Mr. Tarr was there or not.

Q. But at least Mr. Minkler and Mr. Malone were present at this meeting? A. Yes. But there was somebody else, there were three people.

Q. Is this the one meeting you had at which Mr. Malone was present at the negotiations? A. Yes.

Q. And you don't recall the approximate date of that meeting? A. I can't recall. It was in, I believe, probably the early summer, late spring or early summer of 1965.

Q. Now, Mr. Bartels, I hand you Commission Exhibit 34 for identification and ask you if you can identify this document, sir. A. Yes.

Q. And what is it, sir? A. Well, it is in my handwrit-

ing, indicating the summary of one subject of conversation with Herschel Smith on August 11.

Q. And on this date then, you had had a telephone conversation [1868] with Mr. Smith? A. Yes.

Q. And this is a notation you made during the course of that or following that telephone conversation? A. That is correct.

Q. I note in the second, the last two lines of the note, it is stated also send him info from Borden on comparative costs. Do you have any recollection as to what information is referred to in this sentence, sir? A. No, I don't. I can't recall what that is.

Q. Is it possible that this would have been, or, correction, would reading Commission Exhibit 23-A, or looking through Commission Exhibit 23 A through I, refresh your recollection in this regard, sir?

> Mr. McInerney: In regard to whether it is possible?
>
> Mr. Mathias: No, I didn't ask him about any possibility.
>
> Mr. McInerney: Well, may we know what the question is, Mr. Mathias, I am not sure I understand it.
>
> Mr. Mathias: I will rephrase the question, rather than having it reread.

By Mr. Mathias:

Q. Mr. Bartels, does the reading of Commission Exhibit 23-A through -I refresh your recollection as to what is meant by the notation on CX-34 also send him info from Borden on comparative [1869] costs? A. No, it doesn't.

Q. Are you familiar with any other information which you received from Borden concerning comparative costs?

A. I don't recall any. This New York, I think, was the only one that I recalled.

Q. Now, do you recall whether or not you did send him information on comparative costs, that is, with Herschel Smith? A. I know I did not send him this.

Q. That is CX-23? A. That is right. I know I did not send him that. But again, as I can't remember what that referred to, I may have sent him something but I am sure it wouldn't pertain to this subject. I think I would remember that.

Q. Now, Mr. Bartels, can you recall anything else that occurred in this conversation with Herschel Smith on August 11? Did you receive any other instructions from Mr. Smith? A. Well, I can't recall any.

Q. Did you discuss the question of receiving additional bids on your private label business in that conversation? A. Obviously we did, because that is what my notes said that he suggested that we, which we have previously talked about, he suggested that now we go ahead and do that if we wanted to.

Q. All right. Now, you have mentioned a previous suggestion. When did this previous suggestion occur? [1870] A. Well, that might have happened during several conversations beginning back in February.

Q. Do you recall having several conversations during the interim with Mr. Smith concerning this subject? A. Well, let me put it this way, I recall conversations with Mr. Smith, not several pertaining to this one subject. The basic difference, I think, in what we were trying to reconcile here is my feeling at the beginning that perhaps we shouldn't just go out everywhere and solicit bids, because the decision had not really been made by the unit that they really wanted private label milk.

Q. But during the course of this time, you were discussing the private label negotiations with Mr. Smith on a regular basis from February through August? A. Not

regular. It would be on an irregular basis, let's put it that way.

Q. But you did have several conversations with Mr. Smith. A. Yes, I had several, many conversations with Mr. Smith, because they might pertain to Milwaukee or they might pertain to St. Louis, they were not always necessarily on milk nor were they necessarily on Chicago.

Q. Well, do you recall discussing the Chicago milk situation with Herschel Smith in conversations during this period of time? A. I would say at least twice.

* * * * *

[1866] * * *

Judge Hinkes: Well, it is argument in any event. I will allow it.

Mr. Mathias: Rather than cause the reporter to go all the way back through the record, I will try to recall the question as closely as I can.

By Mr. Mathias:

Q. In 1969 and during your later period as purchasing director for the Chicago division, had there been any significant changes in the market share positions of these chains that you have named from that which they had held in 1964, the period 1960 to 1964 which you previously described? A. As I recall it, there was. Jewel Tea experienced a further substantial increase in their share of the market. National Tea, a very slight change. I can't recall whether it was up or down but approximately the same.

A&P dropped substantially and Kroger remained about the same.

Q. Was Kroger still below A&P in sales volume, in market share, in your opinion? A. I can't recall that at that time specifically but I believe so.

* * * * *

[1892] • • •

Q. When you say three sections, do you mean three sections comprising an entire quotation for the entire area? A. Yes, sir.

Q. Now at the time that you submitted this to Mr. Smith, to Herschel Smith, Borden had given you a revised quotation, is that correct? A. That is correct.

Q. Is it customary at A&P to permit a vendor or supplier to submit a second quotation with respect to a particular commodity or line of products? A. Mr. McInerney, to answer the question, it is not customary to do that. In this particular instance, as I believe I stated an answer to a question yesterday, in the beginning we had not decided or the Chicago unit had not decided that they were definitely interested in private label milk.

Our first request to Borden was of an exploratory nature and at that particular time we did not feel, because of our uncertainty as to the ultimate decision that we wanted to, you might say, tip our hand to our competitors as to what we were thinking about.

It was also our intention to, when we once made the decision that we were interested in private label milk, to follow our usual custom of securing of multiple quotations [1893] or quotations from anybody that was interested in having the business.

Q. My question, sir was—I believe you have answered my question but let me put another one. You have said that it was not customary in such a situation to permit a supplier to give you a second quotation.

My question now is, why was Borden permitted to do so in this instance? A. Basically because their quotations had spanned a considerable period of time and we felt that it would be fair to tell them or give them the opportunity of either standing on their quotation or submitting a revised one updated to the same time that the other companies were submitting them to us.

Testimony of Ira Bartels

Q. Turning your attention to Commission Exhibit 263 which you have in front of you, did you at the time that you submitted that to Mr. Smith, make a detailed analysis of the two quotations, that is the Bowman and the Borden quotations that accompanied your letter to Mr. Smith? A. I did not. I used the analysis prepared by the Chicago unit.

Q. Turning your attention to 263H, would you tell us please what that is? A. That is the letter we received from Borden pertain ig to their quotations on private label milk dated September 21.

[1894] Q. Was it customary at A&P to receive such a letter from a prospective supplier when they were giving you a quotation? A. Yes, sir.

Q. Did you at this time or at any other time prior to October 1, 1965, which is the date of this letter, have any discussion with anyone from the Borden Company with respect to obtaining assurances such as are contained in their letter which has been marked 236-H? A. Yes, that was in February, I believe, or thereabouts, of 1965, and I believe subsequent to the time that Mr. Schmidt had asked the Borden Company for quotations on private label, if they were interested.

Q. Will you describe please what was said and who was present on that occasion? A. Mr. Fagerson from the Borden Company, Mr. Minkler from the Borden Company that I can remember. I can't distinctly remember or identify any other Borden people who may have been there but there may have been one more.

Q. Will you describe the conversation as best as you can recall it? A. The conversation I believe, as I recall it, started out with a bit of a sales pitch against the idea of private label in a mild way.

When I indicated that we wanted to proceed with this exploratory thing, I asked them whether that would pre-

sent [1894-A] any problem to them as far as availability for their other customers of private label. As I recall it, Mr. Fagerson said that wouldn't present any problem at all to them.

Q. Were you ever told by Mr. Schmidt or anyone else that this Borden quotation that you forwarded on to Mr. Smith was given to meet competition? At the time that you forwarded it to Mr. Herschel Smith did you believe that this quotation was cost justified? A. Yes, I did.

Q. What was the basis for that belief? A. The basis was that the Bowman quotation, which indicated they had included six percent, as I recall it, or a certain percentage for profit, was comparatively close to it.

As I recall it, the formula that was brought up before, the 2-2-2, was exceeded in the Borden quotation. I also had a great deal of confidence in the Borden Company in their knowledge of the dairy business, being one of the oldest, I believe, and the fact that it was a large company and had what I thought were very sophisticated cost accounting and legal departments.

Q. Did you have any discussion with anyone from Borden prior to the submission of this quotation with respect to Borden's Woodstock plant? A. Oh yes, while that plant was under construction, beginning with the time that it was under construction they kept [1895] assuring us or they told us—let us put it this way—that it was designed to be the most modern dairy plant in the world and when it was in operation it should produce substantial economies and that it was their intention to pass along to their customers a portion of those economies.

Mr. Shaefer: Your Honor, I have to object to the witness' speaking and attributing general statements to Borden without some specific frame of reference either to the time period, the persons involved or

something of that sort. Now the statement insofar as they apply to Borden are completely hearsay.

Mr. McInerney: I don't think they are hearsay, Your Honor. I will ask the witness if he can tell us who discussed the Woodstock plant with him, who from Borden.

The Witness: Over the period of time there would have been Mr. Tarr, Mr. Minkler, I believe Mr. Gose and I believe Mr. Walter Heddon.

By Mr. McInerney:

Q. Who is Mr. Heddon, sir? A. Mr. Heddon was the Borden employee who apparently devoted most of his time to labor work.

Q. Was the efficiency of the Woodstock plant mentioned to you by Borden executives on more than one occasion? A. Oh yes. I can't recall how many but several occasions.

[1896] Q. I think you made what might seem to be a rather cryptic reference to a two-two-two formula which you did mention yesterday, but for the sake of clarity in the record, will you tell us what you mean by the two-two-two formula? A. Well, as I believe I explained it yesterday, that was information that Mr. Herschel Smith gave me that a yardstick or benchmark on private label would be two cents over the cost of raw milk for processing, two cents for delivery, and two cents for the carton and in the processing, of course, I should have said processing and profit, that would fall in there, and those figures would be per quart.

Q. Now, would the figures for the half gallon be the same? A. Approximately. I can't recall. There may have been a very small fractional difference in them.

Q. In which direction? A. Probably slightly less at this particular time.

Q. So that the benchmark that you would use for the half gallon would not be precisely 12 cents added to the cost of raw milk but would be something less than that, is that correct? A. That is correct, but the difference would be very slight.

Q. Now, sir, at the time that you sent your letter of October 1, 1965 to Mr. Smith, that is Commission Exhibit 263(a), with the attachments, did you believe that the Borden offer was preferable to the Bowman offer? [1897] A. Yes, I did.

Q. I notice that there is not with the Bowman offer a letter comparable to the one marked 263(h) from the Borden Company. That is their letter of October 1, 1965 to Mr. Elmer Schmidt. Can you explain the absence of such a letter from the Bowman Company? A. It was not our practice, when asking important quotations, to include the request for the availability letter as part of our request to the various companies, and only after we had decided which company seemed to be the one we wanted to supply to us the merchandise, then we would go to them and ask for the availability letter.

Q. Have you recently, at my request, made a more detailed comparison of the Bowman and the Borden offers that are contained in Exhibit 263? A. I have.

Q. And what is the result of your analysis? A. The analysis shows that Bowman was quoting on a 3.5 butter fat basis compared to a 3.4 for Borden. The Bowman quotation started with a $4.32 a hundredweight, I believe, price on raw milk and the Borden quotation started with a $4.29 price on raw milk.

The Bowman quotation covered both private label or the Bowman brand. We could take our choice. The Borden quotation covered only private label and that became significant in [1898] the price of gallon glass bottles of milk, which we did not want to handle under private label but under the dairy's label.

As I recall the analyis I made at your request, there was a difference in the price between what we were paying Borden for gallon glass milk and Bowman's proposal of slightly over ten cents per gallon lower for the Bowman label.

As I recall the figures, we used something over a million gallons a year, which would result in a saving of roughly $100,000 by changing to the Bowman brand and in the case of the difference in butter fat and the price of fluid, three cents difference in the price of fluid milk, that would bring the cost of the major items on the Bowman brand—that is, the quarts and half gallons of milk—below the Borden quotation for private label.

Q. Was that also true on the quotation for gallons as well in private label? I think you mentioned quarts and half gallons. A. Yes, it would be true for gallons.

Q. So that the net price per unit from Bowman would be less than the quotation of Borden when both were put on a comparable basis, is that correct? A. That is correct.

Q. Now, you mentioned that the Bowman quotation was for either private label or brand label. Did the private label program involve additional expense to A&P as compared to [1899] selling brand label? A. Yes, it did. It involved additional expense where the method of delivery was changed to a store dock delivery instead of its being placed in the coolers or cases. It meant the elimination of servicemen as contrasted to deliverymen who would visit the stores and service the cases and do the rotating, a large share of the rotating, date freshness control rotating.

It, of course, meant that we would have to spend our money to promote the private label instead of relying on the dairies' promotional efforts.

Q. Let me interrupt you there, if I may. With respect to the previous items you mentioned, apart from the promotional expense, wasn't the Bowman offer on the basis of eliminating many of those services as well as the Bor-

den offer? Weren't they comparable in that respect? A. Oh, yes, both were comparable in that respect.

Q. With respect to the promotional expense, would there have been an additional saving to A&P to take a brand label at prices such as those quoted by Bowman rather than going into the private label program? Do you understand my question? A. Yes, I believe I do. I believe there would be, to the extent of what the advertising expense would be.

Q. The Chicago consumer did not know of an A&P brand milk at this time in October 1965, is that correct? [1900] A. That is correct. Of course, that was one of the concerns we have had early in not making a decision without exploratory work that was involved in the private label.

Q. Was the Bowman label well known in the Chicago market? A. Yes, sir.

Q. Now, as a result of all these considerations that you have testified to, comparing the Bowman bid with the Borden bid, what is your present opinion with respect to the relative value of these quotations to A&P? Which was the better quotation? A. Well, the Bowman quotation was better.

Q. Would you look again at Borden's letter, which has been marketd Exhibit 263(h), and tell us what you understood the letter to mean when you received it?

Mr. Mathias: Your Honor, I would object to this witness testifying as to what he understood it to mean unless some basis is laid for showing that there was a basis for that understanding.

Judge Hinkes: I don't know that this witness is qualified to state the meaning of words used by someone else as to his impressions, I don't know whether that is at all pertinent.

Mr. McInerney: I think it is on the issue of good faith, Your Honor. I think he did read it at or about

the date it bears, and I am asking him what his understanding was [1901] at that time. I don't know what basis further than that I can lay for it. I think there is no need for a further basis.

Judge Hinkes: I will allow the witness to answer on the issue of good faith, as you put it.

The Witness: Would you please repeat the question?

By Mr. McInerney:

Q. Looking at 263(h), that letter of October 1, 1965 from the Borden Company to A&P, when you read that on or about October 1, 1965, what was your understanding of the meaning of that letter? A. I understood it to mean that their prices were legal and proper in every respect and that they were prepared to prove that such was the case.

Q. What was your understanding with respect to their making the prices available to others?

Mr. Schaefer: Objection to that question, Your Honor. No foundation laid for the whole area of making the prices available to others.

Mr. McInerney: I think there has been a foundation, there was testimony with respect to a conversation he had with Borden.

Mr. Mathias: Back in 1965, before, he states, they were very seriously engaged in negotiations with Borden.

Mr. McInerney: I don't think this is the proper time for that kind of argument.

* * * * *

[1912] Now, the question is, what was your understanding of that language at that time?

The Witness: May I have my previous answer read or do you want me to start from the beginning?

Judge Hinkes: If you wish, you may start from the beginning, whatever way you prefer.

Mr. McInerney: If you would like your answer read, His Honor will allow it to be read.

Judge Hinkes: Will the reporter find it once again?

(The record was read by the reporter.)

By Mr. McInerney:

Q. I think the question is, what do you now recall about what you understood the language to mean? A. In my previous statement, I said in every respect, which included in my mind that it was available, or would be available, of course, on a proportionately equal basis to all their customers, that it would not be below cost or that it could be cost justified, and that they were in a position to prove that it met every legal requirement.

Q. Now, sir, had you had any discussion with Mr. Elmer Schmidt on the subject of the availability of Borden's prices to other Borden customers prior to your receipt of that letter? A. Yes, sir.

Q. Would you tell us the substance of that discussion?

* * * * *

[1924] * * *

Mr. McInerney: Your Honor, at this point, I would like to show those exhibits to the witness unless Your Honor has some further question he would like to explore at this stage.

Mr. Schaefer: Your Honor, may I interject that there has been no foundation laid as of yet for showing the witness the documents. The witness'

independent recollection of any of the events or matters covered in those documents has not yet been probed and in such a posture, it is inappropriate to show documents to him.

Mr. McInerney: I don't think we have to exhaust the witness' recollection but that is the purpose of my making the statement.

Judge Hinkes: These letters, I presume, are being offered to be shown to the witness for identification purposes. Is that right?

Mr. McInerney: Yes, sir.

Judge Hinkes: I am going to allow that. Whether or not this witness is the one who can authenticate the documents, I don't know but at least the attempt cannot be denied.

Mr. McInerney: Thank you, sir.

By Mr. McInerney:

Q. I show you what has been marked A & P Exhibits 16, 17 and [1925] 18 and I would like you to look at those letters and tell us what they are or what you know about them.

Judge Hinkes: Can you identify those letters, Mr. Bartels?

The Witness: I can identify this first one. I have not read the others.

Judge Hinkes: The first one, August 3, what do you know of it?

The Witness: That was sent to me in connection with a proposal to service stores as identified in the letter and I in turn forwarded it to Mr. Herschel Smith in New York.

Judge Hinkes: It is addressed, however, to Mr. Nelson and not to you. Can you explain that?

The Witness: Mr. Nelson was the Unit Buyer in St. Louis, and, of course, would have forwarded this to me along with the schedule of proposed prices.

Judge Hinkes: Did he forward this letter to you?

The Witness: I recall that he did.

By Mr. McInerney:

Q. May I ask what your position was as of the date of that letter? A. In 1967, I was purchasing Director of the Middle Western Division.

Q. Did that include Mr. Nelson's Unit increase?

Mr. Schaefer: I think the question is whether the [1926] witness recalls this specific document.

Judge Hinkes: I believe he answered that he did recall.

By Mr. McInerney:

Q. Will you look at the next letter, please sir? A. Yes. The two came in together, as I recall it. They referred to the same proposal. Both the August 3 letter and August 8 letter were submitted by Mr. Nelson to me with the proposal at that time.

Mr. McInerney: I offer those in evidence, Your Honor.

Mr. Schaefer: I object to that, Your Honor, on several bases and request voir dire of the witness with respect to these items.

Judge Hinkes: Perhaps before we get into that, we ought to recess because I can see where this might involve some extensive discussion. If I am wrong, of course, tell me and I will allow you to be on now, Mr. Schaefer.

Mr. Schaefer: I think that is right, Your Honor, that would be best.

Judge Hinkes: We will, therefore, recess at this time and resume in this room at 1:30 p.m.

(Whereupon, at 12:05 p.m. a recess was taken until 1:30 p.m. the same day.)

[1927]

AFTERNOON SESSION

1:30 p.m.

IRA R. BARTELS resumed the stand and testified further as follows:

Cross-Examination (Resumed):

Judge Hinkes: The hearing will be in order.

You were going to conduct some voir dire at this point, Mr. Schaefer?

Mr. Schaefer: Yes, sir, thank you.

Voir Dire by Mr. Schaefer:

Q. Mr. Bartels, calling your attention once again to the two documents that have been marked Respondent A&P's Exhibits 16 and 17, these are letters dated August 3 and August 8, 1967. Just to make sure the record is clear, Mr. Bartels, do you now recall having seen these letters on or about the date that they bear in the year 1967? A. It would be shortly after the eighth of August, 1967.

Q. My question is just whether you are recalling that you would have gotten them or whether you specifically recall seeing them at some point in late 1967? A. I recall seeing them.

Q. Mr. Bartels, were you personally involved in the negotiations to which these two letters relate? [1928] A. I was not.

Q. Did you have any contact with any Borden personnel with respect to the proposals to which these two letters relate? A. No.

Q. Were these letters forwarded to you with some covering letter or memorandum? A. They were forwarded to me with a covering letter and the attachments which were the proposal.

Q. Do you know, Mr. Bartels, why the letter dated August 8, the one which is marked Respondent A&P Exhibit 17, do you know why that letter was written? A. I have no idea.

Mr. Schaefer: I have no further questions on voir dire, Your Honor.

Judge Hinkes: The documents have been offered in evidence. I will hear objections if there are any.

Mr. Schaefer: I would like to ask first, Your Honor, whether these documents are being offered with respect to Count 3 of the Complaint.

Mr. McInerney: Your Honor, I am offering them as part of A&P's defense. I am not directing them against Borden or with respect to any allegation against them. I find it difficult to respond to Mr. Schaefer.

Mr. Schaefer: The problem, Your Honor, is, as you might anticipate from my comments this morning, one of our [1929] objections to the admission of these documents relates to whether any showing of relevance to this proceeding has been made.

The questions of relevance as to Counts 1 and 2 are very different in many respects from the question of relevance to Count 3.

Mr. McInerney: I agree with Mr. Schaefer. I think they have more relevance to Counts 1 and 2.

Judge Hinkes: If you have objection with reference to relevance to Count 3, you may persuade me—

Mr. Schaefer: I was wondering whether A&P was offering them—

Judge Hinkes: I think Counsel for A & P is offering them in defense of its own position and not

necessarily as attack on its co-Respondent. However, Complaint Counsel will be entitled to use this document for that purpose unless it is restricted.

Mr. McInerney: If there is any way of shortening this by my saying I am offering it with respect to Counts 1 and 2, I will do that because I do think they are much more germane to those Counts.

Judge Hinkes: You may make that limited offer and it will be received for that purpose only. Then it will be up to Complaint Counsel to use them for other purposes if he wishes to but that will have to be on a separate offer.

[1930] Mr. Schaefer: In that regard then, Your Honor, since Borden is not a party to either Counts 1 and 2, I don't think it is necessary for us to further pursue our objection to the admission of these documents.

Judge Hinkes: Very well. Mr. Mathias, any objection?

Mr. Mathias: No objection, Your Honor.

Judge Hinkes: Respondent A & P Exhibits 16, 17 are received and are limited to Counts 1 and 2 of the Complaint.

(The documents referred to were received in evidence limited to Counts 1 and 2 of the Complaint.)

By Mr. McInerney:

Q. Mr. Bartels, I believe you have in front of you another document which has been marked C-A & P X-18. Do you have that in front of you, sir? A. Yes, sir.

Q. Would you examine that, please, and then tell us what it is?

Mr. Mathias: Your Honor, not to interrupt, but for clarification of the record, but the exhibit Mr.

McInerney mentioned has been marked R-A & P X 18-A & B.

Judge Hinkes: Yes.

Mr. McInerney: Thank you.

Judge Hinkes: You may continue, Mr. McInerney.

[1931] *By Mr. McInerney:*

Q. Mr. Bartels, did you receive this document sometime in or around September 1967? A. Yes. It was subsequent to September 2, 1967.

Q. With respect to this document as well as the two previous documents that you have looked at which have been marked Exhibits 16 and 17 for A & P, how did it come about that you received these documents? A. Document 18-A was Borden's proposal to service stores in the Metropolitan St. Louis area with private label milk. The proposal with this letter was forwarded to me with the other proposals that our St. Louis office had received from other dairies.

Q. You mentioned 18-A. Does your answer equally apply to 18-B? A. 18-A and B.

Q. Sir, how did it come about that Mr. Nelson in St. Louis sent this letter to you? Was that part of his responsibility or duties in his capacity as the Unit Buyer in St. Louis? A. Yes, it was.

Q. Was it the customary practice for a Unit Buyer such as Mr. Nelson to send proposals such as that contained in R- A & P Exhibits 16, 17 and 18 to you as Division Director of purchases for the Middle Western Division? A. Yes, he was required to do that for all proposals on the [1932] particular area. In other words, they would come in together with his summary of them and his recommendations as to which one he felt was most favorable.

Mr. McInerney: I offer A & P Exhibits 18- A & B in evidence.

Mr. Schaefer: Objection, Your Honor and I request a brief voir dire.

Judge Hinkes: You may.

Mr. McInerney: Will you withdraw your objection if I make the same limitation with respect to the same document?

Mr. Schaefer: Yes.

Mr. McInerney: This is being offered under Counts 1 and 2.

Judge Hinkes: Do you still wish voir dire, then, Mr. Schaefer?

Mr. Schaefer: If it is only being offered with respect to Counts 1 and 2, I don't believe that will be necessary, Your Honor.

Mr. Mathias: Your Honor, I will have one or two brief questions on voir dire.

Judge Hinkes: Very well.

Voir Dire by Mr. Mathias:

Q. Referring to Respondent A & P Exhibit for identification, 18-A and B, what relationship, if any, does it bear to the [1933] previous two exhibits Respondent A & P Exhibits 16 and 17? A. The only relationship would be that both of them involve proposals to produce and deliver private label milk but the areas, as you will notice, are entirely different.

Q. Did you have any contact with the Borden personnel in connection with this particular transaction? A. No, sir.

Q. Do you have any personal knowledge as to the stores that are covered by the proposal in R- A & P X-18 A & B for identification? A. Yes, they would be the stores in the Metropolitan St. Louis area.

Q. Were you involved in any way in negotiations for this arrangement? A. No, sir.

Mr. Mathias: No further voir dire, Your Honor. No objection.

Judge Hinkes: I gather, Mr. Schaefer, you have withdrawn your objection.

Mr. Schaefer: That is correct, Your Honor.

Judge Hinkes: 18-A & B is received and relevant only to Counts 1 and 2.

(Respondent A & P Exhibit 18-A & B was received in evidence as limited to Counts 1 and 2.)

[1934] *By Mr. McInerney*:

Q. Looking at R- A & P Exhibits 16 and 17, Mr. Bartels, I believe in response to a question from Mr. Mathias you said that these referred to a quotation by Borden on private label milk. Do you recall that? A. Yes, sir.

Mr. Mathias: Your Honor, I posed no such questions to the witness. I had no voir dire on Respondent's Exhibits 16 and 17.

Mr. McInerney: But in response to a question that you asked, asking him what the relationship was between 16, 17 and 18, I believe the record will show he so stated and he has reaffirmed he so stated so I don't think we need to be detained on that subject.

Judge Hinkes: Very well.

By Mr. McInerney:

Q. Sir, with respect to this private label proposal referred to that was the subject of the letters marked R-A & P -X-16 and 17, what did you do with those letters? A. These letters, together with the price schedule as part of the proposal, were forwarded to Mr. Herschel Smith in New York.

Q. Sir, can you tell us if you recall, did Borden get the business? Was that quote accepted? A. Yes, the one on 16 and 17 was accepted.

Q. What about the proposal to which R- A & P Exhibit 18-A [1935] and 18-B refers, was that accepted? A. We did not accept Borden's proposal referred to in 18-A and B.

Q. Was R- A & P Exhibit 18-A and B forwarded to New York, sir? A. Yes. They would have been forwarded together with the schedule of prices and so forth that Borden had submitted along with those received from other companies quoting on the same business in St. Louis.

Q. Sir, I believe you have told us that prior to the final Borden quotation which you sent to New York, along with your covering letter which has been marked Commission Exhibit 263-A, there was a previous Borden quotation that came to you in several segments. Do you recall that? A. Yes, sir.

Q. Do you recall what the approximate projected savings to A & P on that previous Borden quotation were, if my question is clear? If it is not clear, I will try to rephrase it. A. By previous Borden quotation, you are referring to the one that I said consisted of three parts?

Q. Yes, sir. A. As I remember it, it was in the neighborhood of $400,000 a year were we to go 100 percent to private label.

Q. Sir, did you discuss that prior quotation, if you understand my question, with Elmer Schmidt? [1936] A. The prior quotation, you are referring to the $400,000?

Q. Yes. A. Yes, I did.

Q. What did you conclude with respect to this $400,000 quotation? A. My discussion with Elmer Schmidt was to the effect that I didn't feel that it would be economically sound for us to go to private label on the basis of those figures.

Q. Why was that? A. I made a rough calculation that

that amounted to, I think, somewhere between four or five dollars per store per day on a six-day-a-week basis and that for us to absorb the labor of moving the milk from the delivery point into the cooler, from the cooler to the case, rotating the milk in the case, absorbing the loss on outdated milk and whatever might be involved in the advertising and promotion of our own label, it didn't appear to me it would be worth our while to make the change.

Q. Sir, did anyone from Borden discuss with anyone from A & P in your presence what A & P's out-of-store price on private label milk and dairy products would be? A. No, sir.

Q. Where is A & P's Legal Department, Mr. Bartels? A. The only one I know of is in New York City.

* * * * *

[1957] * * * But looking over the year 1965, you have testified that you received a final proposal from Borden and prior to that time, you received what was at least another proposal, it was in installments. A. Three installments, that is correct.

Q. There were at least two proposals, the initial one and the final one. What I am asking you is whether it is not true that during your consideration of the various offers which were forwarded to you by Mr. Schmidt from the Borden Company, the question of the legality of the price differential between private label and Borden label products came into your discussions with Mr. Schmidt? A. It did in the case of the final proposal. It was not accompanied by the letter that we had discussions about earlier this morning. That is about as well as I can identify it without looking it up here and only because the letter was not attached to the proposals and we made the decision that we were interested in the Borden proposal, then Borden was asked to provide such a letter.

Q. At that time, you indicated to Mr. Schmidt that you

wanted assurances from Borden that they could justify these prices as being legal prices, is that correct? A. No, I think I went further than that.

* * * * *

[1965] (The pages referred to were marked Respondent Borden Exhibit RBX-6A and RBX-6B for identification, and was received in evidence.)

Mr. McInerney: If you are not going to go any further—

Mr. Schaefer: No, I am not.

Mr. McInerney: Then I will not restate my objection.

By Mr. Schaefer:

Q. Mr. Bartels, you testified this morning that the final Borden proposal and the Bowman proposal were transmitted to Herschel Smith in New York. My question is how the transmission was made, was the proposal taken to him personally by you or anybody else, or was it mailed to him? A. It was mailed to him.

Q. Mr. Bartels, you testified this morning that both before and after October 1, 1965 you had received letters from Borden containing language like or language of the sort contained in Commission Exhibit 263H, which is the letter from Mr. Tarr that I believe you have in the exhibits before you. Can you tell us, Mr. Bartels, on what specific occasions prior to October 1, 1965 you had received such letters from Borden. A. No, I can not tell you specific occasions.

Q. Can you tell us of any occasion? A. Not specific. By specific do you mean dates?

* * * * *

Testimony of Ira Bartels

[1973] • • •

Q. Now, would you explain why you see no need for any change? A. I look at it this way: My understanding of the question that Mr. Schaefer asked me regarding discussions of legality, regarding the proposals, was that the pertained to discussions prior to the receipt of the last Borden bid. I recall that I previously testified that when we received that last Borden bid without the letter of assuring us of legal prices and availability I instructed Mr. Schmidt to secure such assurances, which was evidenced by the letter that we discussed earlier today.

Q. And you testified to that previously today, did you not? A. I believe it was today.

Q. Did you also testify with respect to the assurances of availability on this prior occasion in the testimony that I have just shown you? A. Yes, sir.

Mr. McInerney: Your Honor, I would not normally offer this as an exhibit because I don't think that it is necessary, but since Your Honor has accepted the incomplete testimony I would now like to offer this as an exhibit.

Judge Hinkes: Very well. Is there objection?

Mr. Mathias: I have no objection.

Judge Hinkes: Mr. Schaefer?

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[1977] • • •

Mr. McInerney: I think this is an argument rather than a question.

Mr. Schaefer: I am asking the witness whether in fact that is correct. Is it correct that you had only this one discussion with Mr. Schmidt about the assurances you wanted from Borden?

The Witness: I believe I testified earlier today that subsequent to the letter, subsequent to the time that we received final quotation from Borden and

subsequent to our decision to recommend Borden as a supplier, I instructed Mr. Schmidt to secure the letter of availability and legality from Borden.

By Mr. Schaefer:

Q. Yes, and my question is to your knowledge was this the only time this came up, this one instance, that the question of your wanting assurances from Borden came up in your discussions with Mr. Schmidt. This is what you reflected in your earlier testimony. I wanted to make sure that your comment on re-cross examination was not intended to modify that.

Mr. McInerney: I object to that as a question, Your Honor. I think that is a highly argumentative statement. [1978] I think the witness' testimony, however, is quite clear on the subject.

Judge Hinkes: I think we should make it a little easier for the witness to know exactly what you are speaking of.

Let me get the chronology correct. At one particular time, Mr. Bartels, Mr. Schmidt submitted a Borden bid to you and you noted that it did not contain a letter from Borden concerning the legality of the price and you asked Mr. Schmidt to get a letter.

The Witness: That is correct.

Judge Hinkes: What did you ask him to get, specifically?

The Witness: I asked him specifically to get a letter indicating that the prices were available to others on a proportionately equal basis, that the prices quoted were not below cost and that they were legal in all other respects.

Judge Hinkes: And the transmittal of October 1, I think it is—

The Witness: Yes, sir.

Judge Hinkes. —was in response to your request to Mr. Schmidt, is that correct, 263-H?

The Witness: That was Borden's response to Mr. Schmidt's request.

Judge Hinkes: And also in response to your request to Mr. Schmidt?

[1979] The Witness: To Mr. Schmidt.

Mr. Schaefer: My question, Your Honor, is to clarify and make certain that there were not any other discussions with Mr. Schmidt about this letter. That was the ambiguity.

Judge Hinkes: Was that the only discussion you had then with Mr. Schmidt, that discussion in which you told Mr. Schmidt to go back and get a letter of availability or some such letter from Borden?

The Witness: Prior to receiving the letter or subsequent to?

By Mr. Schaefer:

Q. Prior to receiving the letter. A. This was the only discussion.

Mr. Schaefer: No further questions.

Judge Hinkes: Is there anything else, gentlemen?

Mr. McInerney: No, sir.

Mr. Mathias: No further questions.

Judge Hinkes: There is only one thing that disturbs me, and I don't know how pertinent this inquiry is in any event, but I am a little surprised by the Bowman bid which was identical for both private label and for Bowman label in view of your testimony that the private label meant additional cost to A&P and lower cost to the supplier. Can you explain the identical pricing under those circumstances?

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Testimony of John White

July 12, 1973, March 13, 1974

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[1991] * * *

Judge Hinkes: The President of which division?

The Witness: Of the Middle Western Division. It was the Middle Western Division at that time.

Judge Hinkes: You mean that Mr. Pierce and Mr. Lewis then reported to the President of the Middle Western Division from their positions in the unit?

The Witness: Right.

By Mr. Stone:

Q. When you became Sales Director of the Chicago Division, did you have any responsibility to make any kind or report to the New York office? A. No, sir.

Q. Now, Mr. White, how many people were under your authority during your tenure as Sales Manager of the Chicago unit approximately? A. About 18 or 20.

Q. And what were their functions? A. I had clerical girls in my department, I had sales representatives who worked with the field, I had an advertising department, I had a price desk department. I think that would just about cover it.

Q. And in connection with the function which you mentioned of setting prices, pricing the products, were you responsible for the setting of the general prices of all the products A&P sold in the Chicago unit? [1992] A. Yes, I was.

Q. And did the store manager of the Chicago unit have the authority to unilaterally set prices? A. No, sir.

Q. So tell me how you went about setting prices during this period in a general way.

Mr. Curnin: Are we talking about all products that are sold out of A&P stores in the Chicago unit?

Mr. Stone: Yes.

Mr. Curnin: Is this relevant, Your Honor?

Judge Hinkes: Well are you objecting on the grounds of relevancy?

Mr. Curnin: I am objecting on the grounds of relevancy. My understanding is that A&P sells maybe 8,000 items. We will be here for a long time if we have to discuss this as to each of these items.

Mr. Stone: Your Honor, I asked him about his procedure in setting prices.

Judge Hinkes: For all items?

Mr. Stone: For items in a general way.

Judge Hinkes: Is there any need for that?

Mr. Stone: I think there is a need to establish the general procedure utilized by the Atlantic and Pacific Tea Company in setting prices for the Chicago area.

* * * * *

[1996] *By Mr. Stone:*

Q. Now, did your office in all cases set prices in the Chicago unit? A. Yes, sir.

Q. Mr. White, I hand you Commission Exhibit 256-A through Z-28, which appears to be a document entitled the Great Atlantic and Pacific Tea Company and at the left hand corner "price list" the typed word "Chicago" and the printed word "unit".

Can you identify these documents, Mr. White? A. Well, I could not positively identify them. I would say they look like they might be our price pages, yes. It looks like the format that we used at that time. I did not handle the price pages personally nor did I assemble this information to be submitted so I couldn't positively identify them but I would say they look like they are ours.

Testimony of John White

Q. Were these documents assembled under your direction or the direction of your office? A. Under the direction of our office but not under my direction.

* * * * *

[2058] Q. Did you participate in any fashion in the negotiations between the A&P and Borden which led up to the arrangement which brought about the introduction of private label milk in A&P stores in the Chicago unit? A. I did not.

Q. Did Elmer Schmidt or Ira Bartels at any time discuss or suggest to you what retail should be set on private label milk? A. No, sir.

Q. Did either Mr. Schmidt or Mr. Bartels have any authority at all to enforce any suggestion with respect to the retail price of milk or other products sold in A&P stores in the Chicago unit? A. Would you please repeat that question?

Mr. Curnin: Would the reporter read the question.

(Question read)

The Witness: Neither did because the responsibility for establishing retails rested with me as sales manager.

By Mr. Curnin:

Q. Was that a result of a directive at the unit level or was it a matter of company policy? A. It is a matter of company policy.

Q. And would you explain just what is the company's policy in regard to the responsibility of the sales manager for fixing retails on products sold out of A&P Stores? A. It is the sales manager's responsibility to establish all [2059] retails for all merchandise sold. Although he might

not do all of this himself, he is responsible for the final approval.

I might add in the case of milk I set the retails on milk myself.

Q. Did you set the retail at which A&P's private label milk and dairy products would be sold out of A&P stores in the Chicago unit during the period 1965 through 1968? A. Yes, I did.

Q. What factors did you consider in establishing the retail and I ask you now to address yourself to the initial introduction of private label milk and dairy products. A. Mr. Curnin, are you asking me the basis for pricing as I did?

Q. Yes, sir. A. I priced the milk and the by-products at the same retails that we currently were selling the Borden brand for.

Q. And would you tell us your reasons for doing so? A. There had been a precedent set whereby a competitor introduced a private label milk at a lower price than the advertised brand which he carried which resulted in the market meeting that lower price. Later the competitor raised that retail back to the advertised price. I felt the precedent had been set that if I set a retail lower than the advertised brand it would be followed down in the market.

Q. Can you identify for us the retailer that you have reference [2060] to and what point of time this occurred. A. The retailer was Jewel Tea Company and the time was in the mid-50s.

Q. What was the name of the private label milk product that they introduced at that time? A. The item that they introduced at that time was called Yummy.

Q. What are the benefits of private label milk and dairy products as you see them, Mr. White? A. There are several benefits. No. 1, the opportunity is there to increase

your gross profit, providing the item sells; second, it gives you an item that only can be brought in your store and I believe third would be perhaps the flexibility that the buyers have in negotiating for milk.

Q. At the time private label milk and dairy products were introduced in A&P stores in November of 1965, did A&P continue to carry Borden brand milk and milk products? A. Yes, we did.

Q. And was it your decision to continue selling both the Borden brand of milk and dairy products and A&P's private brand? A. Yes, it was my decision.

Q. Did you make a determination at that time as to what the division would be in the dairy case, how much A&P milk and dairy products would be carried and how much of the Borden [2061] brand milk and dairy products would be carried? A. Yes, I did.

Q. What was your decision at that time? A. Well, to play it safe we decided we would display on a 50-50 basis, 50 percent for the private label and 50 percent for Borden.

Q. What were your reasons for fixing that as the ratio 50-50? A. It gave me the flexibility if the private label sold—well I could expand the display space if it didn't sell as well as we had anticipated we could reduce the space or completely eliminate it.

Q. And did there come a point in time thereafter when that ratio was changed between the Borden label milk and dairy products and the A&P milk and dairy products? A. Yes.

Q. Can you tell me approximately when that was? A. It would have been somewhere in six months to a year later.

Q. Whose decision was it to change the ratio? A. It was my decision.

Q. Now, can you tell us what that decision was and how you arrived at it? A. The decision was that we would

expand our own and reduce the Borden label because the acceptance that we had for our private label was very good.

Q. In setting the retail on A&P's private label milk and [2062] dairy products in Chicago did you receive any suggestions or instructions from A&P in New York? A. No, sir.

Q. Did you have any discussions with Mr. Herschel Smith as to what the retail should be on A&P's private label milk and dairy products prior to your setting the retail? A. I never discussed retails with Mr. Smith.

Q. During the period 1965 and continuously thereafter through 1969 did the A&P Tea Company have a policy regarding discussing retail prices with supplier? A. Yes, we did.

Q. What was that policy? A. Our policy was not to discuss retails with suppliers.

Q. During the same period of time starting in 1965 and continuing through continuously through 1968, did anyone from Borden Company ever discuss with you or suggest to you the retail that should be set on milk sold in A&P stores in the Chicago unit? A. No, sir.

Q. Did you ever discuss the retail prices, actual or proposed, on milk and dairy products with anyone from the Borden Company? A. No, sir.

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[2071] * * *

Q. Mr. White, I show you Commission's Exhibits in evidence 91 and 92 and I ask you if you have ever seen these documents prior to this morning. A. I have never seen the documents prior to this morning.

Q. One last question, Mr. White.

To your knowledge did the Executive Committee of the Chicago Unit participate in any way in negotiations for private label milk and dairy products between A&P and Borden? A. No, they did not.

Testimony of John White

Q. Did the executive committee participate in any way in your decision as to the price that would be charged for private label milk and dairy products? A. No, they did not.

Mr. Curnin: No further questions.

Judge Hinkes: Mr. Schaefer.

Mr. Schaefer: No questions, Your Honor.

Judge Hinkes: Any redirect?

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[2097] * * *

As of this moment, I think that further authentication might be a preferable move on your part. In any event, I shall reserve my ruling on your motion.

Mr. Stone: Thank you, Your Honor.

We have no further questions.

Judge Hinkes: Is there anything else?

Mr. Curnin: Just a moment, if I may, Your Honor.

Just one question, Mr. White.

Recross-Examination by Mr. Curnin:

Q. Did the A&P stores within the Chicago unit located in Iowa, did they receive private label milk and dairy products? A. No, they did not.

Mr. Curnin: No further questions.

Judge Hinkes: Thank you.

You may step down.

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[5897] * * *

Mr. Curnin: I note, Your Honor, Mr. White has previously been a witness in this case, called during complaint counsel's case, and that his prior testimony appears on pages 1983 through 2097.

Testimony of John White

Judge Hinkes: Thank you, in which case there is no need for a swearing, again. You may be seated. Let me just remind you you are still under oath.

The Witness: Yes, sir.

By Mr. Curnin:

Q. Mr. White, you have already testified as to your background and position, but to put it in context, would you tell us by whom you were employed during the period 1965 through 1968, and in what capacity? A. 1965 to 1968, I was employed by the Great Atlantic & Pacific Tea Company, and I was the Sales Manager of the [5898] Chicago unit.

Q. And as Sales Manager for the Chicago unit, did you have some responsibility for establishing retail prices out of A&P stores? A. Yes, I did.

Q. During the period 1965 through 1968, did all of the A&P stores in the Chicago unit sell milk at the same retail or out of store price? A. No, they did not.

Q. And there were therefore occasions on which some of the stores had different retails? A. Yes, there were.

Q. What was the reason for that? A. If a Manager called and got permission to meet a retail of a major competitor, 5 or more stores, and that permission was granted, then he sold milk at a different price than the regular retail set for it.

Q. When you say permission was granted, was that permission granted by you or your office? A. Indeed it was.

Q. During the period 1965-1968, on a weekly basis, how many retail stores in the Chicago unit would be selling milk at a lower retail out of store price? A. 20 to 30 a week.

Judge Hinkes: That is 20 to 30 out of how many?

[5899] The Witness: Out of the 175 stores in the Greater Chicago area.

Testimony of John White

By Mr. Curnin:

Q. Again, during the same period of time, Mr. White, what would the price reduction have been on the gallon package that would have been authorized by your office?

Mr. Mathias: I would object to the generalness of that question—what particular instance is he talking about?

Judge Hinkes: I presume this was not a constant situation, Mr. Curnin, and you would have to specify the time or the instance to which you are referring.

By Mr. Curnin:

Q. Lets take 1966, and we will break it down into quarters or half year periods, I think would be one approach to this.

Mr. White, in 1966, in the first half of 1966, can you recall the price reductions which you authorized on gallon packages during that time period to meet the competitive situations about which you have told us?

Mr. Mathias: Your Honor, I would still object. It has not been shown, I mean, this was a uniform thing throughout each of these stores, where a reduction was made. I believe some foundation must be laid here.

Judge Hinkes: He is not being asked for that foundation, as I see it. He is being asked to recall, if [5900] he can. We will go into more specifics after we find out whether he can recall.

The Witness: I think, in answering that question, I would have to say that it would range probably from 4 cents a gallon to 10 cents a gallon.

Testimony of John White

By Mr. Curnin:

Q. And the price reduction authorized on the half gallon package, what would that have been, Mr. White? A. Of course, that was less. It would probably run from 2 cents to 6 cents.

Q. During the balance of 1966, July through December, what would the price reduction have been that you authorized in these stores? A. I would say it would be about the same.

Q. In other words, it would be in the same price range you have given for the gallon and the half gallon? A. Yes.

Q. In the year 1967, can you tell us what price range reductions you authorized? A. I really think it would be about the same.

Q. What about 1968? A. The same.

Q. When you authorized reduced retails in these 20 to 30 stores during this time period, did you receive from your milk supplier a reduction in the into store or wholesale [5901] price that was being charged to A&P? A. Yes, we did.

Mr. Mathias: Your Honor, I would object to that question and ask the answer be stricken unless some foundation can be shown to indicate whether the witness knows whether or not he received a reduction in the wholesale price. There has been no showing Mr. White has any connection with the wholesale price, at this point.

Judge Hinkes: It seems to me that is proper. We will strike the answer of the witness, but you may pursue it further, Mr. Curnin.

By Mr. Curnin:

Q. If you know, during the period 1965 to 1968, what price A&P was paying its milk supplier for milk? A. Yes, I knew the price, the cost of the milk, at the time, yes.

Testimony of John White

Q. Who was A&P's supplier during this time period? A. Borden.

Q. When you authorized a price reduction to meet a competitive situation in those instances, did you receive any price reduction from Borden Company? A. Yes, we did. We received a price reduction.

Q. And in what amount? A. The amount of the difference from our regular retail to the special retail to meet the competitor.

[5902] Q. Let me see if I can give you an example, Mr. White. If you, for example, reduced the gallon price by 4 cents, in other words, you lowered your retail by 4 cents, in what amount would the Borden Company have lowered its into store price to you? A. 4 cents.

Q. What was the dollar amount of the average weekly price reduction that you received from the Borden Company in 1965, and prior to November 1, 1965, when you had to reduce your retails because of the competitive conditions?

> Mr. Mathias: Your Honor, I would object unless there is some foundation for his knowledge here. We have had some very rough estimates here of price reductions, and it seems to me—
>
> Mr. Curnin: I will ask that question, Your Honor.
>
> Judge Hinkes: Very well.

By Mr. Curnin:

Q. In 1965, prior to November 1, 1965, did you know of the approximate dollar amount of the reduction which A&P received in its into store or wholesale price from Borden because of the competitive conditions that you had to meet in the Chicago unit? A. At that time, I was well aware of that, yes, sir.

Q. And what was the amount of that reduction on a

weekly basis? [5903] A. To the best of my recollection, I would estimate about $2700 a week.

Q. Can you recall for us the date on which A&P switched from selling all Borden label milk and dairy products in its stores to private label products and Borden products? A. Around the 1st of November 1965.

Q. After November of 1965, when you had to meet these competitive conditions that you told us about, did you continue to receive a reduction in the into store or wholesale price from Borden on those occasions?

Mr. Mathias: Your Honor, I am going to object to the record at the present time as being to the effect that from 1965 to 1968, that A&P received price reductions to meet competition, and that the approximate dollar—weekly dollar value of these price reductions was $2700 a week. Your Honor—excuse me– I have been corrected. As to the weekly dollar value of this price reduction that was limited to 1965, but the prior testimony elicited, as to the fact of the price reduction applied to 1965 to 1968.

Now, it would appear that Mr. Curnin is going to impeach, in some way, this prior testimony by Mr. White.

Judge Hinkes: I don't know if we can anticipate that. The question that is pending is simply whether or not this witness knows of the price reductions that were in effect, if any, after November 1965. I think that question [5904] can be answered. We will go on from there. Do you want to have the question repeated?

The Witness: If you would, please, Your Honor.

(The pending question was read by the reporter).

The Witness: No, we did not.

Testimony of John White

By Mr. Curnin:

Q. Why was that, Mr. White? A. That was a part of the agreement in the purchasing of the milk, that we would not receive it.

Q. Was that the agreement to purchase private label milk? A. Yes.

Q. One of the conditions was you would no longer receive a reduction in the into store price from Borden when you, A&P, reduced your retail prices to meet competitive prices? A. That is right. We were not going to receive any further allowances from Borden to meet competitive situations, and that was clearly understood between my Buyer and me.

Q. Prior to November 1, 1965, those weekly reductions amounted to approximately $2700 a week? A. Yes, sir. That is my best testimony.

Judge Hinkes: Mr. White, was your failure to receive any price reductions from Borden after November 1965, applicable to private label only or to private label and Borden label, or just to what?

[5905] The Witness: Private label only.

By Mr. Curnin:

Q. Following up Your Honor's question, and according to the agreement, the agreement was you continued to receive a reduction on the into store price on Borden label products when you lowered your out of store price to be competitive? A. Yes, we did.

Q. The loss was only in connection with the private label? A. Yes, that is right.

Q. During the period 1965 to 1968, Mr. White, were you aware of the ratio of expense to total sales in the Chicago unit as compared with other units of A&P? A. Yes, I was.

Testimony of John White

Q. And how did the ratio of expense to total sales in Chicago compare with these other units?

Mr. Mathias: I am going to object on 2 grounds. First of all, this is quite obviously getting beyond milk, plus it goes beyond the statement of the intended testimony to be taken from Mr. White. I will read, as follows—make sure I read completely the proposed testimony from Mr. White, as identified in A&P's witness list, supplemental proposed witness list filed February 11, 1974.

• • • • •

Testimony of Richard L. Kristoff

July 16-17, 1973

* * * * *

[2270] A. We'd send out an employee with a list to check the different supermarkets in the area for the items that we were interested in.

Q. And did these items usually include milk and dairy products, sir? A. Yes.

Q. And why did you compare your prices, sir? A. We wanted to be competitive.

Q. During this time period, can you recall the A & P stores in Hammond ever leading off on a price reduction on milk? A. No.

Q. In your opinion, based on your experience, did your Hammond store compete with the A & P stores in the Hammond—in the Hammond area? A. Yes, I would say so.

Q. And what is the basis for your opinion, sir? A. I would say by customer comments to us, and just being in the geographic area, people are—would shop in our store or their stores.

Q. Were your stores in the—was your store in Hammond and the stores of A & P of comparable size? A. No.

Q. Which would be bigger? A. Ours were bigger.

[2271] Q. Were the A & P stores of super market size?

Mr. Curnin: Objection, your Honor.

Judge Hinkes: What ground?

Mr. Curnin: On the grounds I think the question is unclear. What is super market size?

Judge Hinkes: Well, we'll see if the witness can answer that and what his understanding of it—

The Witness: What was the question again?

By Mr. Mathias:

Q. I asked if the A & P stores were of supermarket size. A. I would say they were, yes.

Testimony of Richard L. Kristoff

Q. What would you understand by "supermarket size"? What size would that connote to you, sir? A. I would say a store size of in excess of 6—6,000 square feet on up.

Q. Now, sir, did the A & P stores have parking facilities in connection with each of them? A. Yes.

Q. And did the A & P stores carry comparable stock to that carried in your store? A. Yes.

Q. Now, sir, in the conduct of your business, how important is purchase price to your company with relation to your ability to compete?

[2272] Mr. Curnin: Objection, your Honor, unless limited to dairy products.

Judge Hinkes: Would there be any reason for departing from the specific area of dairy products?

Mr. Mathias: Yes, your Honor. I believe that it is important to peruse at least superficially the area of competition on the broad retail grocery line. This has been an area of concern by the Commission and the courts in prior cases of like and almost identical import, and we do not intend to go into those with any great degree of depth, but I do believe that it's important to explore the nature of competition in the retail grocery industry. This is the basis on which these people competed.

[2273] Judge Hinkes: I will allow it to a limited extent, but I do think, though, we ought to get into the specifics as quickly as possible.

Mr. Mathias: Your Honor, most of my questions will be directed as specifically as possible in milk and dairy products.

Do you recall the question now, Mr. Kristoff, or would you like it read by the Reporter?

The Witness: Would you read it back, please.

(Question read.)

Testimony of Richard L. Kristoff

The Witness: I—I would say that the purchase price will affect your gross profit and your net profit, and thereby offer you a profit margin comfortable to compete and do whatever you wish to the gross—or the profits.

By Mr. Mathias:

Q. Does it also affect your retail price on a product? A. Definitely.

Q. Do you consider discounts or rebates of one or two percent on a product to be important? A. Yes, sir.

Q. And why is that, sir? A. Well, again I would say it affects your gross profit, and ultimately your net profit.

Q. Are discounts and rebates on milk and dairy products important to your operation? [2274] A. Yes.

Q. And why is that, sir? A. Because it represents a measure, or a part of our total sales.

Q. Milk and dairy products are a substantial part of your total sales? A. Yes—not substantial, but a part of it, I would say in the vicinity of four or five percent.

Q. And just how important is milk to your operations? A. Well, it's an item that is purchased daily by most families. Everyone drinks milk, and it's a perishable item that cannot stand, or cannot keep too long in the refrigerator at home, so we buy it fresh every day so the customer can't keep it too long, so they are in almost every day for milk, or at least two or three times a week for milk.

Q. And does this draw—when they come in to purchase milk, do they purchase other products? A. Right. They purchase other items, right. It's a full service.

Q. In relation to your other, the other products carried in your store, is milk a high volume item? A. Yes, it is. I would say it's of a single item, yes.

Q. Well, are the consumers generally familiar with the milk prices in the various stores?

Testimony of Richard L. Kristoff

Mr. Curnin: Objection, your Honor.

* * * * *

[2281] * * *

Mr. Curnin: What period of time are we talking about, your Honor?

Mr. Mathias: We were talking about 1966 through 1970, but I will make it a little more specific.

During the period of time in this case, from October, 1966, through March of 1967 and June of 1969 through March of 1970,—

The Witness: Other than the—

By Mr. Mathias:

Q. —other than the regular monthly rebate check. A. Yes, some coupons, coupon—we actually took coupons for an item and returned them to the Borden Company, and received payment for those. They were not milk-related, though.

Judge Hinkes: They were not milk-related?

The Witness: No.

They might be dry milk or something. I don't know.

By Mr. Mathias:

Q. Now, in January of 1967, did you receive a second check from the Borden Company in the amount of $207.61
A. That is right.
Q. And do you know what that was for, sir?

Mr. Curnin: Your Honor, I don't wish to interrupt [2282] but the dollar amount and the month somewhat came out of the blue for me. If the Court would permit me, I would like to have that question read back.

Judge Hinkes: Yes, surely.

(Question and answer read.)

Mr. Curnin: Your Honor, when Mr. Mathias refers to a second check, does that mean in addition to the monthly rebate checks that he has been talking about?

Mr. Mathias: Yes.

Judge Hinkes: Can you explain that?

The Witness: Yes.

I don't know what it's for.

By Mr. Mathias:

Q. In other words, you did receive two checks during that month? A. Yes. Our records indicate that; however, I do not know what it was for.

Q. You do not know what the check in the amount of $207.63 was for? A. No, I don't.

Q. I show you a page of your ledger sheet—I show you a copy of your ledger sheet which shows an entry of a deposit for January 19 in '67, and there is a marking, "Bordens," and then a small letter "a" and then the amount "$207.63."

* * * * *

[2327] * * *

Q. Well, let me rephrase it.

You testified that you were supplied during this period of time by both Borden and Meadowmoor. A. Right.

Q. How much of your daily business did Borden have during this period of time, and if it changed, would you let me know, sir, in this one store, now— A. Yes.

Q. —in Hammond, and although I don't specifically refer to the Hammond store all the time, that is the store I am concerned about. A. Right.

Q. And all of my questions are directed to the store in Hammond, Indiana. A. Right.

Testimony of Richard L. Kristoff

Q. During this period of time, '65 through '70, what percentage of your milk and dairy business was handled by the Borden Company? A. I would say between 30 and 40.

Q. Did it change at all during this period of time, sir? A. It was—no, I would say it was fairly constant.

[2328] Q. Did the Borden Company, during this period of time, endeavor to increase their percentage of the products, of their own products sold out of your Hammond store— A. No.

Q. —by offering you special discounts? A. No.

Q. Did you receive offers from Meadowmoor? A. No.

Q. Did they both charge the same into-store price on milk and dairy products? A. Not always. It varied sometimes.

Q. Sometimes Meadowmoor would be lower than Borden — A. Right.

Q. —and vice versa? A. That's true.

Q. During this period of time, again 1965 through 1970, would it be correct to say that Meadowmoor generally was lower on its milk and dairy prices, and that is why it had 70 percent of the business, or 65 percent to 70 percent of the business? A. Yes.

Q. Pleasant View Dairy and the others that you mentioned, were they local brands with local acceptance in the Hammond area? A. Yes.

[2329] Q. Did they offer you a price on milk and dairy products which was lower than that being charged by the Borden Company, if you can recall, sir? A. I don't think so, no.

Q. Did you receive offers from other dairies, the prices of which were lower than that being charged by Borden? A. I would say they were all pretty close to the same. There was no drastic price cutting of any kind.

Q. But may there have been offers, or did you receive offers during this period of time from dairies offering prices lower than that being charged by Borden, even if it

was only a slight difference, as you have described it? A. I would say on occasions that there might have been a half a cent, or a cent a gallon.

Q. In your opinion, Mr. Kristoff, was the gallon the most competitively priced milk package during this period, '65 to '70? A. Yes.

Q. And was also more milk sold in that package than any other? A. In single, single item, yes; not dollarwise, but single item, yes.

Q. You may have testified about this earlier this [2330] afternoon, Mr. Kristoff, but it's not clear from my notes: were you billed at list from the Borden Company, or were you billed at a net price? A. A net price.

Q. Were you ever shown, or did you ever see Borden's published discount schedule as applicable in the Hammond area? A. No.

Q. Were you aware during this period of time, 1965 to 1970, that Borden did have a published discount schedule? A. I was not aware of it. I did not see it.

Q. You testified that you were billed at net.

You have also testified, I believe, that in addition to that you received a rebate check—I think is how you described it—from Borden as well. A. Right.

Q. So that if I may use this terminology, the amount of the bill wasn't a net-net billing, it was a billing from which further deductions were going to be made substantially on a monthly basis? A. That's correct.

Q. You testified about rebate checks, and did you receive, in addition to rebate checks, checks for allowances? A. No.

[2331] Q. You testified this morning that there was a check received in January of '67, I believe, for $207.63, and that is Commission's Exhibit 268, for identification, next to which appears a little "a"; was that an allowance check or— A. Yes, it was an allowance check.

Q. And it was an allowance received in part—or not in part, it was an allowance received on your milk and dairy purchases from Borden for the prior month? A. That I do not know.

Q. Did you receive this amount of money in check or cash? A. It was a check.

Q. Were you purchasing anything else from the Borden Company?

Judge Hinkes: Anything but—

By Mr. Curnin:

Q. Other than milk and dairy products. A. Oh, yes.

Q. And what, such as? A. Well, we have there Borden's Instant Milk; we have some, a lot of dairy items that are Borden's. There is a Borden's Potato.

You have—Borden's I believe has a, like a Cremora. It's a substitute cream item, dehydrated cream.

[2332] Q. Did you receive, during this period of time, allowances on those items, sir? A. Not to my knowledge.

Q. So that to the best of your knowledge and belief, this figure here, this amount, the $207.63 was received from checks with your purchase of milk and dairy products from the Borden Company? A. I have no way of knowing at this time. It could have been.

Mr. Curnin: I am going to show the witness Xerox copies of a document entitled, "Cash receipts, 1966"; if Complaint Counsel has the original, I will show that to the witness.

Mr. Mathias: That is the same as yours. I obtained it from you.

Mr. Curnin: Well, I mean, this document, if there is any question, was produced by Complaint Counsel

to Counsel for A & P, and Counsel for Bordens, I think within the last seven days; is that not correct?

Mr. Mathias: This, I take it this is the one. You resupplied me with a copy this morning.

Mr. Curnin: Well, I Xeroxed what you supplied me. Is there any question about that?

Mr. Mathias: Well, if that is the case, then it's the same thing.

[2333] *By Mr. Curnin:*

Q. I notice this document is entitled, "Cash receipts"? A. That's right.

Q. Would it be proper to assume, then, that it is a reflection of, and a recording of monies received in the form of cash? A. Or—it's or check.

Q. Cash or check? A. Um-hmm. This whole sheet is cash or check.

Q. Going down the first sheet, Mr. Kristoff, and across from November 1, 1966, someone has circled "Bordens, $443.78"; does that reflect a check you received from Borden? A. Yes, that is.

Q. Or cash which you received from Borden? A. It would be a check.

Q. And that was a further reduction in the charge imposed by them on your purchase of milk and dairy products? A. I have no way of knowing that. It's from the Borden Company, but I don't know if it came from the milk, or where it came from, other than it's marked Bordens.

Q. Well, did it come from—and does it constitute a rebate on your purchase of milk and dairy products? A. I would, not knowing actually receiving the check, [2334] I would assume it was on milk products. I mean, I don't know. I would assume it's milk products.

Testimony of Richard L. Kristoff

Q. Let me show you this document, Mr. Kristoff, and I ask you, or I direct your attention to the second sentence— A. Yes.

Q. —and ask you if that refreshes your recollection, if these entries for check or cash payments were not received by you as rebates from the Borden Company on your purchase of milk and dairy products. A. Yes.

Q. And that would be a check received on your purchases in the month of October? A. Right.

Q. Is this in addition to the regular monthly rebate check that you received from the Borden Company? A. I would assume it, yes.

> Judge Hinkes: You say you would assume that; are you saying that you know, or you don't know?
>
> The Witness: Well, it's, you know, it's a ledger entry. It says the Borden Company, and it's, you know, the amount is in there, and I would say we have received very few checks other than Borden checks—coupon and other allowances are very limited, so I would assume this came from Borden, from the milk.

* * * * *

[2347] * * *

Q. And you testified in regard to what's now Page 22D, that that was different from the regular monthly rebate check which you received from the Borden Company. A. Are you referring to that one that was $207.59 or something?

Q. $207.63, sir. A. Yes.

Q. Does that mean that all the Borden checks which are entered here with the designation "a" are checks received in addition to the one regular monthly rebate check from the Borden Company?

Mr. Mathias: Your Honor, I object to the—to the use of the word "addition" here.

The Witness: Yes, that's confusing me.

Mr. Mathias: This—Mr. Curnin is characterizing these entries, and I believe in an unfair manner.

Judge Hinkes: Well, wait a minute. Let's see if we can't straighten this out.

Mr. Kristoff, earlier in your testimony you were asked about an item of $207.63.

The Witness: Right.

Judge Hinkes: If I understood your testimony, you said that that amount of money was received from Borden's as a rebate on your milk purchases in addition [2348] to the regular monthly rebate that you were getting from Borden. Now, is that correct or is that incorrect?

The Witness: Yes, for that one month, that one particular month, two checks were entered.

Judge Hinkes: All right. Now, that amount, that $207.00 amount was marked with a letter "a".

Now, the question is, that being the case, that is, $207 followed by the letter "a", does it mean that every time a rebate amount appears from Borden on that batch of documents, that that amount followed by "a" is also an amount that you received in addition to the regular monthly rebate that you get from Borden? Does the letter "a" mean that in every instance where it appears, just as it happened to mean it in the $207 item?

The Witness: Right.

Judge Hinkes: It does mean that.

The Witness: (Nodding head.)

Judge Hinkes: That is to say, every time the amount appears followed by the letter "a", an amount that you received from Borden, it is in addi-

tion to the regular monthly rebate check that you got?

The Witness: Now, I only received one check per month.

Judge Hinkes: That was regularly?

* * * * *

[2364] * * *

He is here, and Complaint Counsel has told us to verify the net prices paid to during what Complaint Counsel considers to be the relevant time period.

I am not going into an issue, your Honor, which is beyond Complaint Counsel's direct.

Mr. Mathias: Your Honor, we have not gone into the net price paid by the witness. We have not produced any invoice for him to connect up these payments with. We have simply gone into one document which was information in addition to that which we had received from the Borden Company.

Mr. Curnin: This witness is here, your Honor, to—

Mr. Mathias: We merely asked,—as a matter of fact, we did not even go into the document. We haven't offered it in evidence. We merely asked if he could tell from his recollection the nature of a payment that may have been received from the Borden Company in the month of January, 1966.

Mr. Curnin: Your Honor, the purpose of this witness' testimony now is to verify Commission's Exhibit 265.

It was on—

Judge Hinkes: To verify it after it has been received?

Mr. Curnin: That's correct, your Honor.

[2365] Judge Hinkes: If it was not verified at the time of receipt, that was your fault. It should have

been objected to on that basis, and it would have been sustained, but the document was received, because in my opinion it was receivable in evidence.

This witness cannot verify something to my satisfaction after it has been received.

Mr. Curnin: Your Honor, we did object to the receipt of 265, and it's complaint counsel's statement here on the record that this witness' testimony is being elicited to verify 265, because he, himself, has discovered a discrepancy in 265.

Mr. Mathias: No, your Honor, I am not requiring any verification of 265.

Judge Hinkes: No, what he is trying to do is explain an apparent discrepancy in 265 by the entry of two items.

Mr. Curnin: And then the witness' testimony on direct, your Honor, was that he had received two checks in the month of January covering December, and what we are just trying to get at here is just what are the facts.

The Court: I understand that, but I say the time for that is when you present your defense. I will not allow further questioning on this document on matters that have not been brought into the direct examination • • •

[2378] • • •

Q. Now, during this period of time, were you advised by the Borden Company that at your option you could receive a further discount if you did the pre-ordering? A. No.

Q. Were you advised by the Borden Company during this period '65 through '70 that if you accepted drop shipments, in other words, that the milk and dairy products would just be dropped in your cooler, but there would be no rotation of stock, nor removal of outdated merchandise, that you could receive a further discount? A. No.

Testimony of Richard L. Kristoff

Q. Did you during this period of time receive any in-store promotional allowances from Borden? A. Yes.

Q. On milk and dairy products? A. Right.

Q. And did you also receive from the Borden Company point of sale promotional material? A. No.

Q. Did Borden during the course of the year provide demonstrators in your stores? A. On occasions they did, yes.

Q. And were you visited on a monthly basis by the Borden salesman? [2379] A. Yes, I would say so.

Q. Did you receive any—any equipment of any kind from the Borden Company? A. No.

Q. You testified on direct, sir, as I recall, that you received special prices on dairy products which would run for a week duration, and that they amounted to five cents or ten cents off the regular price. A. That is right.

Q. And did you receive these special prices on dairy products during the period 1965 through 1970? A. Yes.

Q. The use of specials by the Borden Company, was that a fairly frequent occurrence during this period 1965 through 1970? A. No, I would say approximately maybe one a month or one every two months.

Q. But it would run for at least— A. A week.

Q. —a week. A. Um-hmm.

Q. And would that special or the promotion which was provided by Borden build traffic in your store? A. We'd reduce the price of the item and pass the savings on to the customer.

[2380] Q. And the special price was promoted? A. And it was—we would sell more of the item than we sold before on normal price.

Q. And these specials were promoted by you through window displays? A. No.

Q. Window signs? A. Just in the store. A sign was hung over the item.

Q. Point of sale advertising sign? A. Yes.

Testimony of Richard L. Kristoff

Q. Was it ever promoted or advertised by you in the local paper? A. No.

Q. Did you participate during this period of time in any co-op advertising with the Borden Company? A. No.

Q. Was there any advertising allowance at all received from the Borden Company? A. No.

Mr. Curnin: Your Honor, I've concluded this line of questioning with the witness. I have several other areas to cover, and I will not be able to conclude them by 4:00 o'clock this afternoon. Considering the hour that it is, and in accordance with your Honor's wishes, this might be an appropriate time to adjourn for

[2381] Mr. Mathias: Your Honor, I'd like for Mr. Curnin to go as far as he can, even if he has to cut off in the middle of a line of questioning. We do have other witnesses scheduled for tomorrow, three others, and I would like to—

Mr. Curnin: I'll go forward, your Honor, if complaint counsel wishes.

Judge Hinkes: Well, I think you should go forward at least for another 20 minutes, but I don't think we want to run past 4:15, in any event.

By Mr. Curnin:

Q. Will you describe for us, Mr. Kristoff, the approximate number of square feet of your Hammond store? A. Oh, about 55,000.

Q. And during what hours was your store open during the period 1965 to 1970? A. 9:00 a.m. to 10:00 p.m.

Q. And would that have been six days a week, sir? A. Right. Closed on Sunday.

Q. You have identified for us certain corporate chains which were in operation in the Hammond area during this period of time.

Are you able to break them down between primary competitors and secondary or less significant competitors [2382] for us? And if that question is not clear, then I'll rephrase it.

I'll withdraw the question, Mr. Kristoff.

You mentioned Jewel. Was Jewel your principal competitor in Hammond?

> Mr. Mathias: Your Honor, I'm going to object to the characterization of "principal" here. This—I don't know whether a proper foundation has been laid for that.
>
> Mr. Curnin: Well, certainly this witness is familiar with his competitors, and I would assume that he is also aware of major competitors and minor competitors, and I think he's certainly qualified to testify.
>
> Judge Hinkes: I think the witness can answer that question.
>
> What is your answer, Mr. Kristoff?
>
> The Witness: You asked if Jewel Tea was a—

By Mr. Curnin:

Q. Jewel. A. —was a major competitor?

Q. Was Jewel your major competitor? A. Are you talking about 1965 through '70?

Q. 1965 through '70, not before, not after, in that time period. [2383] A. I would say Jewel would be a—one of the major competitors.

Q. And National Tea? A. Yes, I would say so.

Q. And the Kroger Company? A. Not as strong, but a competitor.

Q. Now, you mentioned that the A&P store in Hammond was a competitor. By that, sir, did you mean that the A&P

store and your store in Hammond drew customers from the same general area?

Mr. Mathias: I'm going to object to that question, your Honor, because he's mischaracterized the witness' testimony. The witness testified that he competed with three stores in Hammond, and Mr. Curnin has characterized that testimony as being one store.

Judge Hinkes: He didn't.

By Mr. Curnin:

Q. You had reference, Mr. Kristoff, to three A&P stores in Hammond.

Can you tell me where those three stores were located? A. There was one on Homan Avenue, there was one on—there is a store on Sohl—I don't know the exact address of the one on Sohl, and there's one on 165th Street in Hessville.

[2384] Q. When you say 166th (sic) Street in Hessville, is that outside Hammond or— A. It's in Hessville. It's a suburb. It's in the City of Hammond, but it's called the Hessville section. It's near Kennedy Avenue, which is a north-south street.

Q. Was A&P's competition with your store on the same magnitude as Jewel and First National (sic)? A. No.

Judge Hinkes: First National?

Mr. Curnin: Excuse me, your Honor. National Tea, your Honor.

The Witness: National Tea.

Mr. Curnin: I'm referring to a local supermarket. I stand corrected.

By Mr. Curnin:

Q. You testified that you competed with these three A&P stores.

By that did you mean, sir, that your store and these A&P stores drew customers from the same general area? A. Yes.

Q. Isn't it a fact, Mr. Kristoff, that none of the A&P stores was as significant a competitor as Burger during this period of time? A. I would say so, yes.

[2385] Q. And isn't it true that the three A & P stores that you're talking about were much smaller in size and were not maintained or spruced up to the extent that your store was in Hammond during this period of time? A. Yes.

Q. And isn't it also true that some of these A & P stores have since closed down? A. Yes, one closed on Homan Avenue.

Q. Do you have any records, Mr. Kristoff, of the retail prices that were charged in your Hammond store for milk and dairy products during the period 1965 to 1970? A. No.

* * * * *

[2416] A. I don't quite understand your question. The income tax returns are prepared by our accountant from our financial statements to establish our obligation for taxes.

Q. And in establishing your obligations for your tax payments, isn't one of the purposes to maximize the expenses of the corporation so as to minimize, within the law, the profit that the corporation will have to pay a tax on? A. Well, I would assume that they were prepared in an accountant manner that's acceptable by the government. I don't know if his end results or criteria of preparing the statement is that. I've never questioned him.

Q. To your knowledge, did A & P's introduction and sale of private label milk and dairy products during the period 1965 through 1970 injure the business of Burger's Super Markets? A. No.

Testimony of Richard L. Kristoff

Mr. Curnin: Your Honor, I ask at this time if there is any interview report of this witness, that it be made available to us.

Mr. Mathias: Your Honor, the only—we—the only interview report that I am aware of may not have been turned over to Respondents was a statement that—not a statement—rather—but an interview • • •

[2433] • • •

By Mr. Mathias:

Q. Now, during the period 1966 to 1970, how often were demonstrators supplied to your store, sir? A. I would say maybe three or four.

Q. Three or four times? A. Yes.

Q. Now, sir, in response to questioning from Mr. Curnin this morning, he asked a series of questions concerning dairies' offers of loans and equipment.

Were you offered loans and equipment by dairies during this period, 1966 to 1970? A. No.

Mr. Mathias: Your Honor, could we have just a few brief moments recess, and I think that I am completed, but there are some notes from yesterday that I would like to quickly review.

Judge Hinkes: Very well.

(Short recess.)

Mr. Mathias: Your Honor, we have no further redirect.

Mr. Curnin: No recross, your Honor; • • •

• • • • •

Testimony of Glenn W. Gintert

July 17, 1973

* * * * *

[2456] * * *

Q. Now, leaving that for a moment, Mr. Gintert, how important is milk to your operation? A. It's a very important item. It's an every-day item.

Q. Are discounts and rebates on milk and dairy products important to your operation? A. Yes, sir.

Q. And why is that so, sir? A. Because it's an item the housewife buys every day.

If you are competitive on milk and dairy products, you have a good chance of keeping your customers.

Q. What is the—is milk a—how does milk move in your store? A. Very good. It's a—

Q. Is it a high volume— A. It's a high volume item.

Q. Do consumers come in periodically to get milk frequently? A. Oh, yes. It's usually one of the items they come in and shop for, milk and bread, that is an every-day item.

* * * * *

[2464] (Discussion off the record.)

(Question read.)

Mr. Dembrow: Thank you.

The Witness: I don't know how they were calculated.

All I know is we got a check from Borden. I wasn't involved in the—

By Mr. Soeffing:

Q. You don't know whether they were paid on a percentage basis? A. No, sir.

Q. How many checks did you get a month? A. I believe it was two, two or three.

Q. Would these be—would these all be rebates? A. Well, one was a rebate; one was an interest check, and the other one was, I think, a rebate on ice cream.

Q. So there were separate rebates for milk and ice cream? A. Yes, sir.

I don't—some part of the time we didn't get rebates on ice cream, but some time we did.

Q. I understand. A. I am not familiar with the date on those.

Q. The ice cream rebate check that you mentioned, would that have come toward the end of the 1966 through [2465] 1970 period? A. The latter part, yes.

Q. 1969, 1970? A. '70, in there.

Q. And the ice cream rebate check, was that a smaller check or a larger check than the milk rebate check? A. Small.

Q. Smaller? A. Yes, sir.

Q. Mr. Gintert, did you ever receive any loans of equipment or any free equipment from Borden Company? A. Yes, sir.

Q. What kind of equipment was this? A. Coolers, display coolers.

Q. How many? A. One, two; it varied.

Q. Did Borden retain title to these? A. Yes, sir.

Q. You only have the use of the coolers? A. Yes, sir.

Q. How much would you estimate the value of these coolers or cooler, at the time you received it, or them? A. Oh, probably $500.

Q. Do you remember approximately the time you first [2466] received the cooler? A. No, sir.

Q. Was it prior to 1966? A. I—I don't, can't remember. I know periodically they have always, you know, but—

Q. Was it recently or was it some time before that?

Mr. Schaefer: Objection, your Honor, to—

Testimony of Glenn W. Gintert

Mr. Soeffing: Strike the question, strike the question.

By Mr. Soeffing:

Q. Do you have the cooler now? A. Yes, sir.

Q. Did you receive it in the last couple of years, or prior to that?

Mr. Schaefer: Objection, your Honor.

The witness has already stated he does not recall, and as long as I am interposing an objection, I will also object as to the questioning seems to be going far beyond what is relevant to Count 3 of the Complaint.

Mr. Soeffing: Your Honor, first of all I think that to handle the question, as I recall, in these hearings in Washington we had a large number of, let's say, discussions or confrontations about exhausting the memory of a witness before you went on to something else, [2467] or another way to refresh it.

I only asked him one question. He said he could not recall. I was trying to make it a little more specific, and that was only the second question trying to elicit the recall.

I think I am entitled to a second question. I don't intend to ask him about it five or six times.

Judge Hinkes: I think the question is proper as far as refreshing his recollection is concerned; whether it's applicable to Count 3, though, is another matter.

Mr. Soeffing: I have no way of telling now, your Honor, if it might not be applicable to Count 3. I can't see any real basis for objection.

I am advised, your Honor, that it will be fine if we eliminate it to Count 3, too—we will eliminate Count 3 as to the relevance.

Judge Hinkes: As to this question?

Mr. Mathias: As to this point, your Honor.

Mr. Soeffing: Yes, as to this point.

Judge Hinkes: Now the pending question is whether you have a cooler presently, and your answer was "yes"?

The Witness: Yes, sir. Yes.

Judge Hinkes: Now you may go on from that [2468] point, Mr. Soeffing.

By Mr. Soeffing:

Q. Did you receive it, say, in the last couple of years or prior to that, if you can remember? A. Probably prior.

Q. And did you ever receive any promotional aid or promotional material from Borden Company during the period 1966 through 1970?

Mr. Dembrow: Can I please have that question read back again?

By Mr. Soeffing:

Q. Did you ever receive any promotional materials or advertising help from Borden through the period 1966 through 1970? A. Yes, sir.

Q. What kind were they? A. Just banners, flyers.

Q. How often was this done? A. Just periodically. I couldn't say.

Q. By "periodically" what do you mean? A. Once every two or three months. Seasonalized I would say, yes.

Q. Yes.

Now, Mr. Gintert, did the Borden Company ever aid you in obtaining any loans in connection with your [2469] business? A. No, sir; not me personally.

Q. I mean the Wilco Food Center. A. Yes, sir.

Testimony of Glenn W. Gintert

Q. Do you know how they—how they did that? A. No, sir.

Q. Were these loans taken out from a bank?

Mr. Schaefer: Objection, your Honor.

He already testified that he does not know how Borden did this, and it seems to me that further questioning is, by Complaint Counsel would be in the nature of leading the witness, and not appropriate.

Mr. Soeffing: Your Honor, number one, I don't think—I think Mr. Schaefer is slightly confused. I think the loan was made to Mr. Gintert and not to Borden, and then to Mr. Gintert, so I don't think that that objection is valid.

And second of all, I don't think it's leading the witness because I think that is the kind of a question that can be answered "yes" or "no" without suggesting an answer to the witness.

Either he received a loan from the bank or he didn't receive the loan from a bank, and that can be very easily answered "yes" or "no."

* * * * *

[2493] * * *

Q. During this period of time, '65 to '70, was Wilco a member of any cooperative organization? A. Yes.

Mr. Soeffing: Your Honor, I'm going to object, a very limited type of objection.

I think on direct we went into the period 1966 to 1970. Insofar as Mr. Dembrow covers the same ground, I think he ought to restrict himself from 1966 to 1970. I have no objection to the basic question itself.

Mr. Dembrow: I was not aware that all of—

Mr. Soeffing: Not all of them were.

Mr. Dembrow: —Complaint Counsel's questions were limited to the period '66 to '70, but I believe that—

Mr. Soeffing: I said insofar as they cover the same period.

Judge Hinkes: Well, in any event, since we're not sure of that, I'll allow the question, but I think it should be made more specific with respect to any differences that may have existed between '65 and '66.

Mr. Soeffing: Thank you, your Honor.

By Mr. Dembrow:

[2494] Q. Mr. Gintert, during this—I think you just stated during this period of time that Wilco was a member of a cooperative organization. A. Yes, sir.

Q. Now, which cooperative organization would that be? A. Central Grocers.

Q. And during—did Central Grocers have their own brand of milk which they offered to Wilco during this period of time? A. I don't think so. I'm not sure.

Q. Was there a brand of milk called Centrella Milk? A. There was. I don't know whether it covered this period of time. I know there is now.

Q. I see. Do you recall, is the Centrella brand of milk more than a few years old? Is it—well, do you recall when you first heard of this Centrella brand of milk? A. Probably three or four years ago. I'm not sure on that.

Q. Do you recall whether when Centrella brand of milk first came out, if it was offered to you as a member of the cooperative? A. I'm not sure.

Q. Do you recall at any time before 1970 whether Central Grocers made you aware that they had a brand of [2495] milk called Centrella that you could purchase?

Mr. Soeffing: I'm going to object to that. I think that any time before 1970 is a long time. If you could make it just a little more specific—

By Mr. Dembrow:

Q. Any time between 1965 and 1970. A. I couldn't say that.

Q. Did there come a time when it was offered to you, this Centrella brand? A. Yes, sir.

Q. Do you recall when that was? A. No, sir.

[2496] Q. Do you recall what the price of Centrella was in relationship to the price you were then paying for Borden and Dixie? A. No, sir.

Q. Were the prices for this Centrella brand lower than the prices you were paying for Borden and Dixie? A. I think so.

Q. I am not sure whether we established a little bit earlier, Mr. Gintert, in regard—were the prices—I don't remember if I did ask this question, the relationship between the prices you were paying for Borden and Dixie.

Mr. Soeffing: That has been asked.

Mr. Dembrow: That has been asked.

Judge Hinkes: Yes.

Mr. Soeffing: I think, your Honor.

Judge Hinkes: Yes.

Mr. Dembrow: Thank you.

Judge Hinkes: Now let's be sure we understand. You said that you were a part of this co-op of Central grocers.

Are you still a part of that co-op?

The Witness: Yes, sir.

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Testimony of Glenn W. Gintert

[2514] • • •

By Mr. Dembrow:

Q. Mr. Gintert, I believe in your direct testimony this morning in regard to rebates that you received from Borden, you mentioned that you received an interest check. I believe that was the term you used? A. I think that's right.

Q. Would you explain what this interest check was? A. Well, that's just in the book as interest.

Q. In other words, this was a rebate that you received from Borden? A. Yes.

Q. For milk and dairy products? A. Yes.

Q. I believe you testified this morning that you received, during the period of time in question, '66 through '70, Wilco received one or two display cases from Borden. A. Yes.

Q. Would you know the approximate size, to the best of your recollection, of these cases? A. Well, they're just the standard display case. Probably two by three, something like that, two and a [2515] half by four.

Q. Would that be—the two by three that you're referring to, what measure are you using? A. Feet, two and a half feet by three.

Q. I think you also were asked some questions about a loan that Wilco received either from Borden or with Borden's assistance.

Do you recall about when this loan was received by Wilco? A. I think that was in '63 or '64. I wasn't involved in that, so I don't know of any of the details on that.

Q. Do you recall—I realize you say you don't recall the details, but if I just may, do you recall the approximate amount of this loan when it was initially received by Wilco? A. One was four thousand something. The other was $16,000.

Q. Do you know when these loans were paid off? A. No, sir.

Q. Do you know the period during which these loans would have been paid off; in other words, how long a period for each of these loans were? A. No, sir.

* * * * *

[2522] * * *

At about that same time, was there any other changes in the method of delivery to you by Borden of their milk and dairy products? Did anything else change at that time? A. I think about that time is when they didn't want to guarantee the—the only thing they guaranteed would be the damaged stuff that, or spoiled stuff that was—if they brought it in out of date. If it was our negligence, why, we had to suffer the loss.

[2523] Q. Right. You are saying that this was a change. What was the change from? In other words, what was the practice prior to this change, prior to this change did Borden guarantee— A. Guaranteed everything.

Q. In other words, prior to this change Borden took the risk of all non-salable merchandise? A. Yes.

Q. After this change occurred, Borden would only be responsible for damaged packages? A. Yes, sir, or outdated stuff that they brought in.

Q. Stuff that they brought in that was already out of date? A. Yes.

Q. And if I may, at about this same time—and you testified there was a change as to ordering, and a change as to what products would be returned to Borden; was there also a change as to special deliveries? A. Yes, sir.

Q. Can you establish at all when this change took place— A. No, I can't.

Q. —during this period? A. (Shaking head.)

Q. Do you have any idea of the year it occurred? A. I would say it was about '66, '67, in there, but * * *

* * * * *

[2526] Q. So you would not know what the markup of the retail price markup was— A. No, sir.

Q. —over wholesale.

Mr. Gintert, do you recall during this period of time, '66 through '70, what the most competitively priced single milk package was in terms of container size or product? A. Probably the half-gallon.

I couldn't—that was the fastest selling item, so I would imagine that would be the—

Q. Was the gallon jug a very competitive—gallon jug of milk a very competitively priced item during that period of time? A. No, I don't think so.

Q. Mr. Gintert, during this period of time there was some questions this morning about advertising.

Did you advertise, Wilco advertise homogenized milk very much? A. Very seldom.

Q. Would you say that this would have been true of A&P also in terms of advertising homogenized milk? A. Right.

Q. Mr. Gintert, do you recall during this period of time, '66 through '70, whether A&P introduced private-label [2527] milk and dairy products? A. I can't recall for sure.

Q. Do you recall—you say you can't recall for sure whether they did or when—or when they did? A. Either one.

Q. Are you aware at some point during this period, '66 through '70, that A&P was selling private-label milk and dairy products? A. Yes.

Mr. Dembrow: Your Honor, I am almost complete with my cross examination, and we have been going for a while.

I wonder if we might take a short recess so I can check my notes.

Judge Hinkes: Very well.

Testimony of Glenn W. Gintert

We will take a five-minute recess.

I think that in view of the near completion of cross examination that perhaps you, Mr. Schaefer, can prepare for your cross examination, if you have any.

Mr. Schaefer: I will do so.

Judge Hinkes: Very well.

(Short recess.)

* * * * *

[2531] * * * you called one of these rebates an interest check, but that you are unaware of what exactly that referred to; is this correct? A. That's right.

Q. Were you aware, during the period of time in question, of any loan that was made by Wilco to Borden? A. (Shaking head.)

Q. I believe you will have to, for the Reporter's benefit,— A. No.

Q. Mr. Gintert, during each of the years from 1965 through 1970, is it correct to state that your net sales in dollar amounts increased each year? A. Yes, sir.

Q. And during the same period from '65 through '70 is it correct to say that each year your gross profit increased in dollar amount? A. Yes, sir.

Q. And, Mr. Gintert, is it also correct to state that during this period, '65 through '70, this five-year period, that your net profit before taxes increased more than 50 percent between 1960—1965 and 1970? A. I am not sure of the exact percentages, but it did [2532] increase.

Q. Yes. Is 50 percent approximate? A. I couldn't say. I don't remember the figure. You have the figures.

Mr. Dembrow: Your Honor, subject to the request to examine the documents we have referred to, we have no further cross examination at this point.

Testimony of Glenn W. Gintert

Mr. Soeffing: Your Honor—

Judge Hinkes: Yes.

Mr. Soeffing: —I just want to point out that the questions about the rebates on direct examination were as to the method calculated, and general questions, and I don't think we ought to have any deferred cross examination.

We didn't go into any detail on the rebates or figures, and numerous figures, calculations, and I think it's beyond the scope of direct to defer cross examination on that kind of a—

Mr. Dembrow: Your Honor—excuse me.

Your Honor, I believe that Mr. Soeffing has incorrectly portrayed his direct examination.

I recall questions about the amounts of rebates, and whether one was larger than the other, and approximate dollar amount of various checks.

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Testimony of Christopher Lasorso

July 18, 1973

* * * * *

[2650] * * *

Q. How important is milk to your operation, or was it during this period? A. Well, I imagine that it's our number one commodity for our customers to come in for, and that's at least three times a week, maybe more.

Q. Are customers generally familiar with milk prices? A. Very much.

Mr. Curnin: Objection, your Honor.

Judge Hinkes: On what basis?

Mr. Curnin: No foundation.

Judge Hinkes: I'll allow the question, but I would expect you to follow that up with some inquiry as to how he has that information.

Mr. Stone: I believe, your Honor, that the testimony has already indicated that customers remarked as to prices.

Judge Hinkes: Yes, but your question is concerning what, now?

Mr. Stone: Milk.

Judge Hinkes: Well, what do you want to know [2651] about milk?

Mr. Stone: I wanted to know if customers were generally familiar with milk prices.

Mr. Curnin: And I object to that question, your Honor.

Judge Hinkes: Well, would you know, Mr. Lasorso, if your customers were familiar with milk prices?

The Witness: I believe they would be, yes.

Judge Hinkes: Now, why do you base—on what do you base that answer?

The Witness: Well, it's a commodity that they buy—if they don't buy it every day, at least two or three times a week.

Judge Hinkes: Yes, but what makes you think that they are familiar with the prices?

The Witness: Well, it's an item that, like I said, that they buy—it isn't an item—like they'll buy coffee and say, "Well, I buy that in a two-pound can, it will last me for two weeks or one week", you know. I mean, it's milk. It's an everyday item, and they're more conscious of things they buy every day than they are of things that they buy once every two weeks or once a week.

* * * * *

[2676] * * *

By Mr. Curnin:

Q. You mentioned, sir, that you had been approached during this period of time by other dairies. A. Yes.

Q. What dairies contacted you during this period, 1966 to '70? A. I think it was Deans.

Q. And do you recall when that was, sir? A. Not exactly the date. Sometime in that.

Q. Do you recall if it was in 1966? A. No, I don't think so, because we just had started more or less with, with Bordens.

Q. I thought your testimony was, sir, that you opened in 1963, '63,— A. Three, yes.

Q.—'64? A. Yes.

Q. And that you opened with Bordens at that time.

Now I am asking you generally about a period two years later; would it have been in 1966 that you were contacted by the Dean milk company or maybe the name is Dean's Foods? A. No, I really—I couldn't swear to the time, but they were there sometime, I don't remember when exactly.

Testimony of Christopher Lasorso

[2677] Q. And what proposal did they make to you at that time, sir? A.. Well, they offered me more rebate.

Q. Higher than Borden? A. Right.

Q. And can you tell us as best you can recall what was the rebate that you were receiving from Borden at the time you were approached by Dean? A. I believe it was 25.

Q. And Borden was offering you 25 percent off list? A. Off list.

Q. And what did Dean offer you off list? A. I believe it was about 27 to 29. I think we were bickering.

Q. In addition to offering you a higher discount off list, did Dean offer you anything else? A. No.

Q. During this discussion that you had with the Dean representative, did he tell you that they would also afford you regularly special promotions? A. Well, I only talked to them a couple of times, and it was—I was very much satisfied with Bordens, and, I mean, when I heard I could get more from Deans, I called Bordens and their sales manager came out and he said he will see what he can do for me, and he brought [2678] up my percentage.

Q. In other words, he matched the proposal— A. That's right.

Q. —that you had from Deans? A. (Nodding head.)

Q. And it was at this time, then, that your discount off list was increased to 29 percent, or thereabouts? A. Yes.

Q. Now, when the Borden representative increased your percentage, did he ask you for any proof of the proposal that had been made to you by Dean? A. No, he didn't.

Q. During this discussion, or series of discussions that you had with Dean, did they offer you anything else for your business, such as did they say, "If you take on Dean milk we will give you some equipment for use in your store"? A. No, there was no mention about equipment.

Q. Did they offer anything else to you, sir, of value, of any description? A. Not that I know of. They were just giving me—their label was well accepted, Deans.

Q. In your market? A. Yes.

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[2692] • • •

Q. Well, would it be your testimony that during the period 1966 you believe your prices were competative with A & P and Jewel on milk and dairy products? A. I believe so.

Q. And does that mean as far as you can recall, sir, that the prices were the same? A. Yes.

Q. During the period 1966 in your area, what was the most competitively priced milk package? A. Gallons.

Q. And was that also the package in which the greatest quantity of milk was sold? A. Yes, that's the biggest one.

Q. And at any time during 1966 were you approached by a dairy other than Borden, at which time they offered to sell you milk and dairy products? A. I said Dean's had approached me.

Q. Anybody else in addition to Dean on the Dean label? A. I think Wanzer was—Wanzer milk, Wanzer Milk Company.

Judge Hinkes: You said that Dean approached you, but if I understand your earlier testimony, you weren't sure of the date, and now you're answering the question, [2693] and the question relates to 1966. Now, is that your testimony that it was Dean in 1966?

The Witness: Well, I thought any period of time, but Dean was in the early part.

Judge Hinkes: "Early part" meaning what?

The Witness: 1965 or '66. And Wanzer was later, much later.

Testimony of Christopher Lasorso

By Mr. Curnin:

Q. Wanzer was beyond 1966? A. Yes.

Q. And was the price that they offered to you better than the price that you were then receiving from Borden? A. I believe so on the basis of list price, but I didn't know what their list price was.

Q. But you understood their price to be better than the Borden price? A. Well, I was more concerned with percentage of the rebate off the list.

Q. Well, how were you judging the prices? A. Well, if I—if I would have got the price list from them, you know, and then I would take Borden's and compare them, what's the use getting a bigger percentage back if you're paying more money for the milk?

Q. I mean, is it your testimony, sir, that they offered you a bigger discount but you didn't know what that [2694] discount was going to be off? A. That's right.

Q. Did you have any discussions with the man from Wanzer at that time that you'd like to know what that was and you'd be able to judge his price? A. Well, I tell you what, we just talked once, and I really wasn't interested in taking another dairy, because I had proven I had good faith in Borden's, and my customers accepted it, and I didn't feel as though I wanted to trade and start all over again trying to educate my customer to a new product.

Q. And did you also feel that there would be a certain amount of trouble if you had two dairies supplying you? A. I really don't know if we would have trouble.

Q. Having two dairies supply and dual billing and the like? A. I—I never questioned that if we would have a problem or if we would split the stock.

Q. Were you contacted by anybody else, sir, any other dairy during the period—year 1966? A. No.

Q. Now, were you a member of Grocerland in 1966? A. Yes.

Q. Now, did Grocerland offer to its members a private label brand of milk? [2695] A. No, they didn't.

Q. Did they at any time in 1965? A. No, they didn't.

Q. Did they offer a private labeled brand at any time during the period '66 to '70? A. No, they didn't.

Q. They offered only what, the general Grocerland line, sir? A. Just the Grocerland.

Q. You may have mentioned this before, sir, but would you tell me again the percentage of discount that you were receiving from Borden in 1966? A. I believe it was 25 percent.

Q. And did it remain constant through the year or did it change at any time in 1966? A. I forgot exactly when it was changed, but it was changed to 29. I don't remember if it was the following year.

Q. But it may have been in 1966 that it changed to 29 percent? A. It might have been. I'm not sure.

Q. And this was a discount off the list price? A. Yes, sir.

Q. Did you ever see a Borden discount schedule in 1966? A. I don't remember.

[2696] Q. You answered some questions for Mr. Stone this morning about the services you were receiving from the Borden Company in 1966. There may have been some aspects of that service that he didn't cover which I'd like to cover with you now, sir.

How many days a week did you receive milk from Borden in 1966?

Mr. Stone: Your Honor, I would object. The witness testified about rebates, and he testified about monetary help he may have received from Borden, and he testified about no other services.

Judge Hinkes: The present question has to do with deliveries.

Mr. Stone: Yes, your Honor.

Judge Hinkes: I'll allow the question. That could be considered as a type of an aid furnished to a retailer. In other words, more deliveries, less deliveries that has some effect as an aid.

Mr. Curnin: Would you repeat the question for the witness, please?

(Question read.)

The Witness: In 1966, we were still getting six-day delivery.

By Mr. Curnin:

Q. And during 1966, did you receive special deliveries [2697] from the Borden Company on milk and dairy products? A. It happened.

Q. Now, would you describe for us, sir, your store as it existed in 1966? For instance, how many square feet did you have? A. I had 5,500 square feet.

Q. And where was your cooler located that you used to store milk, dairy products, and other things that required refrigeration? A. At that time we had a—excuse me—we had a cooler in back, but most—all the milk went into my dairy case in the selling area.

Q. It was delivered into the case by the Borden driver? A. No, it was delivered to the case.

Q. In other words, he would wheel the milk through the store and he would stack it by the dairy case? A. He'd leave it there. We'd stock it.

Q. No, but he would bring the milk in and deposit next to your dairy case? A. Right.

Q. He did not deliver it to the cooler, although you had a cooler? A. (Nodding head.)

Judge Hinkes: The answer is yes?

The Witness: Yes. I'm sorry.

Testimony of Christopher Lasorso

[2698] *By Mr. Curnin:*

Q. At the time he delivered milk to your stores, did the Borden driver check your stock to determine if you had any out of date merchandise? A. Yes.

Q. And would he remove that stock from the dairy case? A. Yes.

Q. And would he also rotate some of the stock that was in it to be sure that the older dated merchandise was being brought forward? A. We usually took care of that. The only thing he'd look for was the out of code.

Q. But were there occasions, sir, during 1966 when he assisted your dairy man or stockman—I don't know how you describe him—in rotating stock in your dairy case? A. Yes.

Q. All right. In addition to checking stock in the dairy case and removing outdated merchandise, did the driver also prepare the order for the next delivery? A. Yes, but, now, say our—we sold a hundred gallons of milk a day, his job was just to build it up to a hundred. If I sold 60, he would leave me 40. He knew better than I did, you know.

Q. And because he knew better than you did and because he was checking your dairy case, he was the one who was [2699] making out the order? A. Right.

Q. In addition to these visits, deliveries by the Borden driver, were you also visited by a Borden salesman during the course of 1966? A. Yes.

Q. And for what purpose would he visit your store? A. Goodwill ambassador.

Q. Would he also bring with him some materials, point of display type advertising which might be beneficial to you in the sale and promotion of milk and dairy products? A. Yes.

Q. When outdated merchandise was removed from your

store by the Borden driver, would you get a credit for that merchandise? A. Yes.

Q. In other words, Borden ran the risk of spoilage? A. Yes.

Q. Were you advised by Borden at any time during 1966 that you would—were entitled to receive or could receive an additional discount if you did the pre-ordering? A. It was never mentioned to me.

Q. Did the Borden driver or any Borden representative at any time in 1966 advise you that you could receive an additional discount if you ran the risk of spoilage on [2700] outdated merchandise? A. No.

Q. Now, the discount that you received during 1966, is it your testimony that that was an across-the-board discount? A. Yes.

Q. On total dollar volume of milk and dairy products purchased? A. Yes.

Q. Now, in addition, did Borden offer you, during 1966, specials on dairy items? A. Yes.

Q. And the value of that would be what, five or ten cents an item? A. Depends what they were—they had a program every week, they would run one particular item every week, and all the stores got that.

Q. And this was of value to you in promoting the sale of dairy products in your store? A. Yes.

Q. And the amount of the reduction, how was that reflected, in a lower net billing to you, or did you receive—I mean, in other words, did you receive a credit? A. No. It would be—they would—on the net billing [2701] they would reduce the price on it. If it cost 42, and they gave you a nickel off, they charged you 37.

Q. And that, a net charge was reflected in a reduction off the— A. List.

Q. —billing price? A. Right.

Q. They did not supply you with a check? A. No.

Testimony of Christopher Lasorso

Q. During the year 1966, did Borden supply you with certain items to decorate your store, such as balloons and streamers, and things of that sort? A. They only did that for a grand opening.

Q. Just for the grand opening? A. (Nodding head.)

Q. They didn't do it at any time during the holiday season in 1966 in connection with certain holiday promotions that they might be having? A. I don't think so.

Q. Is it possible, sir, that that occurred during 1966, that such material—

Mr. Stone: I'll object to speculation.

Judge Hinkes: As possible as anything. Let's try to rephrase that.

* * * * *

[2715] * * *

Judge Hinkes: Well, that is not the issue. The issue is the connection between the payments and the cost of milk from Borden. That is the connection I am looking for.

I don't care to know the details of his payment on a freezer that is not involved in the milk sale or purchase.

Mr. Curnin: But the witness has testified, I believe, your Honor, that this is part of his over all dealings and his over all relationship with the Borden Company.

Judge Hinkes: And that was not sufficient when you raised the objection to allow the question to go on.

No, I am going to sustain the objection.

By Mr. Curnin:

Q. Is it true, Mr. Lasorso, that the net sales of Mayfair Foods in terms of dollars increased in 1966 over that which

it had realized in 1965? A. I don't have the figures, but I know we did increase, but I am not sure if it was '66 or '67, but—

Q. And did your gross profit in terms of dollars increase in 1966 over 1965? [2716] A. No.

Q. I show you these documents, Mr. Lasorso, and ask you if that—these documents CX-184-B and sub parts 184-G sub parts refresh your recollection? In 1965 your company reported gross receipts six hundred one odd thousand dollars, less cost of goods, four hundred seventy-five odd thousand dollars, gross profit $126,000.

Mr. Stone: Your Honor, I see no reason for reading these tax returns into the record.

Judge Hinkes: The document, Mr. Curnin, is already in evidence, and if the witness has made a mistake, that can be clearly demonstrated.

Are you seeking an admission from the witness that he made a mistake? I don't quite understand it.

Mr. Curnin: Well, I just want to refresh his recollection, your Honor. He said that gross profits in terms of dollars did not increase in 1966 over 1965 based upon cost of—gross receipts less cost of goods sold, and now I'm showing him the tax returns of the company to ask him if that refreshes his recollection that it wasn't otherwise.

The Witness: Yes.

By Mr. Curnin:

Q. Gross profits in 1966 in terms of dollars was higher than that of the company in 1965? [2717] A. Yes.

Q. Thank you, sir.

To your knowledge, sir, did A & P's sale of private labelled milk and dairy products during the month of February and March 1966 injure your business? A. No.

Mr. Stone: I object, your Honor.

Mr. Curnin: He's answered the question, your Honor.

Mr. Stone: It calls for speculation.

Judge Hinkes: Well, are you asking that the answer of the witness be stricken?

Mr. Stone: Yes, your Honor. I see no probative value.

Judge Hinkes: Well, the witness is certainly an expert at his own business, and he has answered that certain behavior had no competitive effect on his business. To that extent, I think it's permissible as an answer. I'll overrule the objection.

Mr. Curnin: I have no further questions of this witness at this time.

Judge Hinkes: Mr. White.

Mr. Stone: Your Honor, might I inquire if that means that Mr. Curnin's cross-examination is closed?

Mr. Curnin: Unless something comes up on the [2718] basis of Mr. White's examination or any redirect by counsel.

Judge Hinkes: I take it that when counsel tells me that he has no further questions, that's it, and he'll only be permitted recross at a later time under circumstances that warrant it.

Mr. White.

Mr. White: Thank you.

Cross-Examination by Mr. White:

Q. Sir, during 1964, '65, '66, during that period that you were purchasing milk products from Borden, did you from time to time receive from Borden price lists for those products, the prices you were being charged from which the discount was being calculated? A. Yes.

Q. And those were normally mailed to you or given to you by the route driver? A. By the route driver.

Q. This afternoon you told us about the incident where the Dean representative solicited your business and offered you a discount and it ranged from 27 to 29 percent, and that you then called Borden and explained this to a Borden representative; is that correct? A. Right.

[2719] Q. Did you tell the Borden representative that Dean had offered you that discount? A. I believe so.

Q. Did you tell the Borden representative the truth? A. Yes, I did.

Q. Now, you've mentioned this Termis Liquor Store, I believe you said was the name of the store, which was in the same block that you were located. A. Across the way from me.

Q. Did I understand correctly that this store in particular sold gallons of homogenized milk? A. Yes, sir.

Q. And that was a large item in that store? A. Yes.

Q. From your observation of your own customers and of being in that liquor store, was that liquor store selling a lot of milk? A. I believe so.

Q. It was a very active competitor of yours in the sale of milk; is that correct? A. Right.

Mr. White: That's all, your Honor.

Judge Hinkes: Any redirect?

Mr. Stone: If I might just have about a half a minute to confer with counsel.

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Testimony of Manley Minard

July 23, 1973

* * * * *

[3182] * * *

Q. And would that be true through the period of '66 to '70? A. '66 through '70, I believe we—it seems that we quit buying from Borden in our Valparaiso store in January of 1970.

Q. In January of 1970? A. I think that's correct.

Q. And who became your dairy supplier at that time? A. Home Dairy.

Q. H-o-m-e? A. Right.

Q. Are they a local dairy, sir, as you would describe it, or— A. No, they are not.

Q. Where do they operate from? A. From Bern, Indiana.

Q. Bern? A. B-e-r-n.

Q. And how far away is that from your Valparaiso store? A. Approximately 120-30 miles.

Q. During the period 1966 through 1970, was Home Dairy operating in the Valparaiso area? A. No.

[3183] Q. When did they come into the Valparaiso area? A. Well, they weren't, to the best of my knowledge; I assume that they came into the Valparaiso area when they began deliverying milk to us.

Q. You don't recall their being in the area servicing others, or soliciting customers prior to January of '70? A. Not to my knowledge.

Q. When were you first solicited by Home Dairy? A. Some time in 1969, I think.

Q. Beginning of the year, middle of the year? A. I have no idea.

Q. Did you handle the negotiations, sir? A. Yes.

Q. Would it have been in the second half of 1969? A. More than likely, yes.

Q. Did Home Dairy offer to serve any of your other

stores, and specifically, your stores in Gary and Highland? A. Yes.

– Q. Did you switch to Home Dairy in January of 1970 because they offered you a better price— A. Yes.

Q. —than you were then paying the Borden Company? A. Yes.

Q. And did they offer you any additional services or other benefits? [3184] A. Yes, weekly specials.

Q. Anything else, sir? A. No.

Q. Is the method of delivery by Home Dairy to your Valparaiso store the same as it was when you were receiving milk from the Borden Company? A. In Valparaiso, Yes.

Q. Yes.

So that you switched to Home Dairy because they offered you weekly specials, and better milk prices and better prices on dairy products? A. Right.

Q. When you stopped dealing with Borden in January of 1970, was there any equipment or whatnot on the premises that you had to return to the Borden Company? A. Yes, there was equipment on the premises.

Q. What equipment was returned to Borden in January of 1970? A. There was no equipment returned in January.

Q. I may have misunderstood your testimony, sir. I thought there was some equipment on the premises that was returned to Borden at this time. A. No, I am sorry. I misunderstood the question.

There was some equipment belonging to Borden on the premises.

[3185] Q. Well, in January of 1970 did they pick that equipment up? A. No, they did not.

Q. They left their equipment there? A. Yes.

Q. Did you buy it from them? A. No, I have not.

Q. The equipment still belongs to Borden? A. Yes.

Q. Have there been any discussions between you and Borden as to the return of the Borden equipment? A. Yes.

Q. And can you tell us about those discussions, sir, what they said to you and what you said to them? A. Well, there has been a long range of discussions immediately thereafter, after the change, suggested by them. They would —we haven't determined what the equipment is.

Q. Yes, will you identify the equipment for us? A. Okay.

The equipment is a dairy cooler.

Q. Used for what purpose, sir? A. For milk storage and dairy products storage.

Q. Is this a walk-in cooler? A. Yes.

Q. How big is it? [3186] A. (No response.)

Q. In approximate square feet, is it ten feet wide and twenty feet long? A. I would say ten by sixteen.

Immediately after we left, quit buying from Borden and Company in Valparaiso, the discussions of the cooler came up, and it was decided then by Mr. Joe Hines, who worked for Borden at that time—and still does—that perhaps he would just leave it there for a while, and we will think about it, and maybe we won't continue buying from Home, we will go back with Borden, and so that kind of rested for a long while.

Subsequent discussions were "how about buying it?"

"No, I don't want it. How much do you want for it? That is too much. Come and take it out."

"Well, let's let it go for a while."

That is still going on at the present time.

Q. That is the present status? A. Right.

Q. Is it still being used by you, sir? A. Yes.

Q. When did you receive this dairy cooler from the Borden Company? A. It was in two stages. Dates are pretty tough.

It seems like 1967 they placed a dairy cooler [3187] outside the store. At a later time, when we were remodeling,

they added to that same dairy cooler, and it was placed inside a newly-built back room area.

Dates escape me.

Q. But your recollection is now that you received a cooler from them in 1967? A. Yes.

Q. And when did you remodel the store, sir? A. In '69, I believe.

Q. And then did they transfer that outside cooler into the remodeled area, or did they bring in a new cooler? A. We merely built around it, and they enlarged the same cooler that was on the outside.

Q. They enlarged the capacity of the cooler— A. Right.

Q. —that you had for a two-year period? A. Yes, sir.

Q. Did you have the use of this cooler without charge from the Borden Company? A. Yes.

Q. Did they—and by "they", I mean the Borden Company, did they maintain it? A. No. It was our obligation to maintain it.

Q. You maintained it and you supplied the electricity? A. Right.

[3188] Q. In 1969, did you enlarge the Valparaiso store? A. Yes.

Q. And in addition, did you modernize it? A. Yes.

Q. And did you do so to take advantage of the increased business that that store was experiencing in an effort to further increase the business? A. Yes.

Q. What? A. Yes.

Q. How large was the store, sir, prior to its enlargement in 1969? A. Approximately 25,000 square feet.

Q. And it was increased to what size? A. 35.

Q. You testified, I believe, that the Home Dairy offered to serve your stores in Gary and in Highland in 1969; is that true, sir? A. Right.

Q. But you decided not to take them up on that offer? A. That's right.

Q. And why was that, sir? A. It was a new dairy. We didn't know how it would do. We decided to try it in one store and see how it worked out.

Q. How has it worked out in your Valparaiso store? [3189] A. Extremely well.

Q. Have you transferred them, or given them additional stores to service? A. Yes.

Q. And what stores are they serving now?

Mr. Mathias: Your Honor, I am going to object to this further line of questioning because it obviously goes beyond the 1970 period—at least it appears to me that it does.

Complaint counsels evidence only goes through March of 1970, and this inquiry would appear to be irrelevant to the issues of this case.

[3190] Judge Hinkes: It seems you are going beyond the 1970 period.

Mr. Curnin: May we determine, your Honor, from the witness just when the changes occurred?

Judge Hinkes: All right.

Mr. Curnin: And if it's beyond the period, then it's beyond the period.

The Witness: June of '70, as I recall.

By Mr. Curnin:

Q. June of '70? A. Right.

Q. In June of 1970, what stores did they commence serving?

Mr. Mathias: Your Honor, I'm going to object.

Judge Hinkes: I believe you have the cutoff of March, '70, don't we?

Mr. Curnin: Well, we do, your Honor. However, I think I'm entitled, as a background question, to find out when the stores, or the service to the stores started, and then to go back as to when the negotiations commenced and when they decided to accept.

Mr. Mathias: Your Honor, I'm not too sure—

Mr. Curnin: And I think that that's relevent, for obvious reasons.

Mr. Mathias: Your Honor, those obvious [3191] reasons escape me completely. I don't see what difference or what bearing on this case this witness' dealings with Home Dairy have at all. I—so I do not believe that the relevance is so obvious.

Judge Hinkes: I'm going to sustain the objection to the question.

The question as now posed is fairly narrow. The inquiry is whether—is as to what stores began receiving the Home Dairy milk in June, 1970. Now, that, I think, is totally irrelevant, and I think that I must sustain the objection.

By Mr. Curnin:

Q. Did you, prior to March of 1970, enter into negotiations with the Home Dairy to supply your two stores in Gary and/or your store in Highland? A. Yes.

Q. And when did you enter into those negotiations, sir? A. They were going on continually.

Q. Starting at what time? A. Sometime in the latter part of '69.

Q. And the Home Dairy offered to sell milk to all of your stores at a price below that which was then being charged to you by the Borden Company? A. Yes, sir.

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[3208] • • •

Q. But Borden salesmen would call on you, sir? A. Oh, yes.

Q. Who ran the risk of loss for spoilage during this period of time, '66 to 70? A. Generally, the dairy service.

Q. During this period of time, did you get in-the-store promotional material from Borden for your five stores? A. Yes, on occasion.

Q. And did they ever send around demonstrators to your stores? A. Yes.

Q. And did you also receive weekly specials on dairy products? A. Yes, we did.

Q. Five and ten cents off items? A. Generally not that much, but three to five.

Q. Did you receive on occasion from Borden during this period of time in these stores free samples? A. Yes.

Q. And did you receive from them assistance at the time of opening of a new store or the refurbishing of an existing store? [3209] A. Yes.

Q. And what would that consist of? A. Well, generally during an opening, it would involve some free samples to pass out to customers as a giveaway, and, oh, help of one or two of their people for a few days, or one day during the opening, just general help to take care of their stock or help customers in general.

Q. You mentioned that—excuse me, sir. A. As I stated, the dairy cooler.

Q. Pardon me? A. The dairy cooler that we have already talked about.

Q. They would go in and rotate the stock? A. No, no. I mean the, allowing us to use a walk-in cooler.

Q. Here you have reference to the walk-in cooler at the Valparaiso store— A. Right.

Q. —that you had starting in 1967? A. Um-hmm.

Q. Did you have the use of coolers or other equipment in any of your other stores? A. No.

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[3223] • • •

Q. Would you explain to us what that represents, and how it was calculated? A. I don't know exactly how it was calculated. I can tell you the theory of it. It was a, simply a loan we, Joe Tittle and Sons borrowed, borrowed money, and for which we repaid principal and interest. Borden subsidized the interest in some amount. I am not quite clear exactly how—for example, if we paid seven percent, they perhaps reduced the interest payment by two percent.

The checks were, as I recall, decreasing in value each month through this period.

Q. Did the interest subsidy payments vary— A. Yes.

Q. —during this six-month period? A. Yes.

Q. And did you receive any interest subsidy payments, both before and after this period? A. Yes, we must have.

Q. When did you take out the loan? A. I—I can't—I don't know that.

Q. What was the amount? A. To the best of my knowledge, it was $200,000.

[3224] Q. What bank? A. (Shrugging shoulders.)

Q. You don't know, sir? A. I do not know.

Q. Did Borden help Joe Tittle and Sons get this loan? A. I—as I recall, they did.

Q. And the interest subsidy was two percent, as best you can recall, on the total interest payments? A. As best I can recall.

Q. And how often did the company receive that payment? A. Monthly.

Q. And how was that money entered on the books? A. It was merely applied to that, that same account to reduce the interest payment.

Testimony of Manley Minard

Mr. Curnin: I ask Complaint Counsel if he has a copy of the Tittle Food Center's letter dated November 4, 1972, and if these documents were produced pursuant to a subpoena, I ask that we be shown a copy of the subpoena.

Mr. Mathias: You mean this November 4, 1972—

Mr. Curnin: Yes, that letter, if it was produced pursuant to a subpoena.

Mr. Mathias: It was not produced pursuant to a subpoena.

I do have a copy of the letter here.

[3225] Mr. Curnin: I would like to show it, and the attachment, to the witness.

Mr. Mathias: You want the other copy as well, don't you?

Mr. Curnin: I have written on my copy.

Mr. Mathias: There may be writing on this copy. Let me see.

There is—if there is, I have no objection to him looking at it. There is writing on it.

Mr. Curnin: Is that an attachment to the letter?

Mr. Mathias: That is—these are some carbon copies—I mean, some Xerox copies.

Mr. Curnin: Of the same letter?

Mr. Mathias: Of the same attachments. I do not have any cleaner copy than that.

Mr. Curnin: No, but the letter in front of you, or the document in front of you looks to be different from the documents that I have in my hand.

Mr. Mathias: Those are my own personal notes, Mr. Curnin. Would you like to look at them? You may not.

Mr. Curnin: If it may be relevant, it may be worthwhile.

Testimony of Manley Minard

By Mr. Curnin:

Q. I show you this document and ask you if you are [3226] familiar with the—I have a copy, your Honor—are you familiar with the records which are attached—

Mr. Mathias: Your Honor, I would object to the characterization by this witness of what is attached to that letter.

Judge Hinkes: Well, the witness hasn't been asked to characterize.

Mr. Mathias: No, but Mr. Curnin, in his question, has characterized the attachments to that letter as records.

Judge Hinkes: Well, let's just ask the witness, then, if he is familiar with the attachment to the letter, what appears to be a three-page attachment.

The Witness: Yes.

By Mr. Curnin:

Q. Can you describe the first two pages that are annexed to this letter dated November 4, 1972? A. The interest expense and interest return? Is that the—

Q. No, the—all right. That is not the first one that I have, but going to that page, sir, which is headed "Ledger," — A. Um-hmm.

Q. —interest expense and interest return, what does that represent? [3227] A. It looks to me like the interest expense and interest return from Borden on the loan that we were discussing.

Q. In other words, under the column "Credits", those are the payments you received from Borden which you have described as being an interest subsidy for the period of time specified, September '65 through August of '66? A. Right. Yes.

Q. Will you look at the other pages, sir, and tell me what information is reflected on those sheets?

Mr. Mathias: Your Honor, I think—

The Witness: I don't know. .

Mr. Mathias: —the witness has not yet been qualified to respond to those, to a question as to those sheets. It hasn't been shown that he is familiar with these particular sheets.

Judge Hinkes: There is nothing to indicate that this witness is at all involved in this communication, and he is not qualified to explain it, unless he has some personal knowledge.

By Mr. Curnin:

Q. Have you seen these sheets before? A. No, I have not.

Q. Do you know what form the company recorded rebate payments received from Borden? A. In a ledger.

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[3249] * * *

Q. There is an entry on 30-C, No. 8, Bordens, and is that the interest payment again? A. Yes, again, correct.

Q. To your knowledge, does Respondent A&P Exhibits 30 and 31 represent the interest payments and rebates that the company received from Borden? A. Yes.

Q. Do you know whether or not it's a complete record of all the payments that you received from the Borden Company? A. I don't know. I would presume that it is.

Q. You did not prepare the record? A. No.

Q. I notice there is an entry here on 30-C, Borden Valparaiso, $25.

What does that represent? A. I could only guess that an amount like that would be a payment for a demonstrator

or—and/or product used in a one-day sale, or something like that, or perhaps we used our own.

Q. But a rebate you received from the Borden Company— A. Yes.

Q. —applicable to your Valparaiso store? A. That would be different than the others.

[3250] Q. My description of it is correct? A. Yes.

Mr. Mathias: Your Honor, I—I would strongly protest Mr. Curnin's describing the documents, figures herein.

The witness has stated that it is different from the other. I believe that if he wants to find out what this is about he should ask the witness rather than testifying himself on the record.

Judge Hinkes: The question was a little confusing, Mr. Curnin. When you said that your description was correct, what description were you referring to?

Mr. Curnin: I will go over it, your Honor. I thought that it was clear. I will have to go back now and find it.

[3251] *By Mr. Curnin:*

Q. There's an entry here on 30G, Item.3 for the Borden Company, $25 from—which is applicable to the Valparaiso store. A. Right.

Q. And that represents a rebate or a payment which you received—

Mr. Mathias: Your Honor, I object again to his characterizing it. He should ask him what it is.

Mr. Curnin: Well, the witness has already testified what it is. There's no confusion as to the record on that testimony.

Mr. Mathias: But he has not characterized it as Mr. Curnin is now characterizing it, your Honor.

Judge Hinkes: Well, it's still cross examination, Mr. Mathias, and it's permissible.

Mr. Curnin: Would you read the question?

(Question read.)

Mr. Mathias: Now, your Honor, I would object on the grounds that it's a dual question. He said "rebate or payment you received". Now, I do not believe that it's a sufficiently clear question.

Judge Hinkes: Well, if there's a difference, I think we ought to be clear about that.

By Mr. Curnin:

Q. Mr. Minard, this $25 payment which is applicable to your Valparaiso store was a payment you [3252] received in connection with your dealings with the Borden Company? A. If it's entered in that ledger, and that's a copy of our ledger, that would be a payment received from Borden Company.

Q. And it's a payment received in connection with your purchases of milk and dairy products from the Borden Company? A. I don't know that for sure.

Q. Were you buying other products from the Borden Company other than milk and dairy products? A. No.

Q. So wouldn't it be correct to say, sir, that it would have to have been received in connection with your purchase of milk and dairy products from the Borden Company? A. In connection with our purchase, yes.

Q. There's an entry on 31 O, and I can't read which item it is, but it says "Borden, Inc.", and then there's a dollar payment $65.49.

Can you tell me what that was for, sir? A. I can't identify that.

Testimony of Manley Minard

Q. Did the Borden Company offer Tittle a private label milk and dairy product during the period '66 through '70? A. Yes, sometime in that period it was discussed.

Q. And did other dairies offer you a private label during [3253] the same period of time? A. Not that I recall.

Q. Was the Tittle business profitable and growing during this period? A. '66 through '70?

Q. Yes, sir. A. Yes.

Q. And the dairy business, the milk and dairy business, it was growing and it was profitable? A. Yes.

Mr. Curnin: No further questions.

Judge Hinkes: Mr. Schaefer.

Cross Examination by Mr. Schaefer:

Q. Mr. Minard, you spoke this morning about you or your store managers or store personnel regularly comparing out-of-store or retail prices of your competitors in the various areas where your stores were located.

Were these comparisons made in writing? A. Yes.

Q. And am I correct in understanding from the subpoena directed to Tittle that for the period 1964 through 1966 that you no longer have copies or have not retained copies of these reports? A. No.

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Testimony of Edward Barney

July 27, 1973

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[3690] *By Mr. Soeffing:*

Q. Mr. Barney, do you talk with the people who shop in your store from time to time? A. Yes.

Q. And do they talk to you about prices of your competitors, and your own prices? A. At times, yes.

Q. And at times do these include the prices on milk? A. Almost always.

Mr. Schaefer: Does the witness understand the time period that we are talking about, that I would—

Judge Hinkes: Let's be sure.

Mr. Schaefer: At least Complaint Counsel should use the past tense in his questioning.

By Mr. Soeffing:

Q. Have you talked with people during the period 1966 through 1970 on these matters? A. Oh, certainly.

Q. Now, Mr. Barney, thus has it been your experience that the consumers shopping at your stores are generally familiar with milk prices? A. It has been my experience, yes.

Q. Now, you told us—are there any other reasons why milk is important besides the volume of purchases by your consumers, or your customers? [3691] A. Well, it just happens, it happens to be in—if I am allowed an opinion, a—probably one of the three or four main items in a supermarket are our dairy products, our meat products, our bakery products. These are things that people shop regularly.

Q. Mr. Barney, what effect would it have on your business if you sold milk at a price higher than that charged

by the large corporate chains? A. We would soon hurt our business terrifically.

Q. Are you familiar with the term "Leader"? A. Yes.

Q. What does it mean to you? A. It could mean one of two things, either the items that we advertise are a noticeably good value when we advertise in the paper, which can be considered a leader, or those items that we have regularly shelfed priced at a price that is a noticeably good value to a customer.

Q. And is milk sometimes used as a leader in the Hammond market area?

Mr. Curnin: Objection, your Honor, getting here with a whole host of hypotheticals. I ask that we determine from this witness what, in fact, happened during this time period.

Judge Hinkes: The question is whether milk was a leader in this area at the time that we are [3692] speaking of. I don't know that we can get any more specific than that—or did you have something else in mind?

Mr. Curnin: That is not—I did not understand that to be the question, your Honor.

May we have the question read?

Judge Hinkes: Let's have the question read back.

(Question read.)

Judge Hinkes: Now the objection once again?

Mr. Curnin: He didn't ask him whether or not milk was used.

Judge Hinkes: Yes, that is about the only suggestion I might make. You might use the past tense to indicate we are still talking of the period '65 to '70.

Mr. Soeffing: No, '66, your Honor.

Judge Hinkes: '66 to '70. Excuse me.

Mr. Soeffing: Yes, sir. Your Honor, I am sorry.

By Mr. Soeffing:

Q. Mr. Barney, was milk sometimes used as a leader your market area in the period 1966 through 1970? A. Yes.

Q. Mr. Barney, were you f miliar, in your position with with Model Food Center, Inc.'s, dairy purchasing [3693] practices in the years 1966 through 1970? A. Definitely.

Q. And did your Hammond store purchase from Borden only, or did it purchase from Borden and someone else? A. Borden and Dean.

Q. And approximately how much shelf space was devoted to the Borden product, and how much to the Dean product? A. As near as possible, 50 percent each.

Q. How, sir, if you can describe for us, was Model Food Center, Inc., at least with regard to its Hammond store, billed by Borden? A. Net.

Q. This is in the period June '69 through March of 1970? A. That was billed net.

Mr. Schaefer: Now, your Honor, if we are going to separate out the questions as to '69 and '70, then I object to them insofar as they relate to count three.

My understanding was with respect to questions about the entire period, that only the period up through '68 would relate to count three.

Mr. Soeffing: Your Honor, we understand that.

Judge Hinkes: Well, just for the record, then, let's have it clear that the questions relating to the period '69-'70 are not applicable to count three.

[3694] Mr. Soeffing: It is clear in my mind, your Honor.

Testimony of Edward Barney

Judge Hinkes: Very well.
Mr. Schaefer: Thank you, sir.

By Mr. Soeffing:

Q. Now, you state that you were billed net, and I asked you if you were billed net for the period June, 1969, through March of 1970, to the best of your knowledge. A. To the best of my knowledge that is the way we were billed in respect to the Hammond store.

Q. That is correct. A. Okay.

Q. Now, again with respect—and was that billing on a, on what kind of a basis was that billing? A. Weekly.

Q. It was done weekly.

Now, for the period October, 1966, through March of 1967, how was your Hammond store billed by Borden? A. To the best of my knowledge it was billed on a net basis, plus an allowance for gallons, and specifically gallons, and that doesn't mean gallonage, but gallon, gallon product, gallon milk product.

Q. So you received some kind of an allowance on gallons [3695] only? A. Right.

Q. And on what kind of a basis was that, if you remember it? A. Four cents a gallon, I believe it was.

Q. Now, those—these cents off payments, how often were they paid? A. Monthly.

Q. And when were they paid? A. Oh, product delivered this month would be paid next month, somewhere in the area of the 15th or 18th of the month, or something like that.

Q. So for example, a payment for October would probably be paid sometime in November? A. In November; yes, sir.

Q. During these periods did you also purchase ice cream from Borden? A. Yes.

Q. Mr. Barney, did you ever receive any free equipment

from the Borden company during the years 1966 through 1970? A. Relative to what? We received—we have—we had some equipment relative to ice cream.

Q. In the Hammond store? A. One in each store, as the case may be.

[3696] Q. Did you receive anything else in connection with milk for your Hammond store? A. No.

Q. The answer is "No"? A. No.

Q. What did you receive, if any, in the way of promotional aid for your Hammond store with regard to milk and dairy products? A. Well, I am not sure I understand the question as to promotional aids. Could be promotional flyers, or this kind of stuff which was available, but which we seldom used, or are you referring to possibly lesser prices on promotional, things that we promoted?

Now, we—we did receive some things, some allowances, promotional allowances on things that were advertised in the paper.

Q. Were these milk and dairy products? A. Dairy products, not milk.

Q. Did you receive these often? A. Assume—relatively every time we advertised a product at a lesser price than our regular shelf price we had some allowances allowed us.

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[3743] • • •

Q. It's your testimony that you purchased both milk and dairy products from Borden as well as ice cream during this entire period '66 to '70? A. I believe that is correct.

Q. All right.

And that in connection with the ice cream side of it, you received equipment, and also a loan? A. That is correct.

Q. And was that part and parcel of your entire dealing with Borden? In other words, your purchase of milk, dairy products, and ice cream? A. No, sir.

Q. Why not? Was it something separate and distinct? A. It was separate and distinct for ice cream, period.

Q. But I realize that the equipment and the loan were with relation to ice cream: my question to you, sir, however, is this: Was the receipt of the loan and the receipt of the equipment, and in fact, the receipt of ice cream, part and parcel of your entire dealings with Borden? In other words, the purchase from Borden of milk, dairy products, and ice cream. [3744] A. I am not sure I understand what I am supposed to answer to that question.

I—I am not sure what you—what you really expect me to say.

Now, not that you expect me to say anything, but I—

Q. I don't know what you are going to say, Mr. Barney. A. That is right, but I am not sure I understand exactly what you mean.

Q. In other words, so that the— A. We—we bought milk and ice cream from Borden.

Q. Right. A. And in the process of buying the milk and ice cream we got this equipment and the loan.

Now, other than that I can't—I can't say anything else about it.

Q. All right. A. I can't make something out of it that it isn't.

Q. No, and I don't want you to, and that answers my question. A. Okay.

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[3777] • • •

Q. In addition to her approving advertising, what did she do? A. (No response.)

Q. Was she involved, for example, in any of the buying side of the business? A. We most often during, for example, during our conversations with any dairy company, we would have sat down together, all three of us.

Q. And how many of those conversations did you have during the period 1966 to 1970? A. Oh, it's hard to say. I listen to anybody that wants to talk to me.

Q. You mean you listen to any dairy that wants to talk to you? A. That's right.

Q. And were you approached frequently by dairies— A. Oh, certainly.

Q. —during this period '66 to '70— A. Yes.

Q. —for your business? A. For our business?

Q. Yes. A. Oh, yes.

Q. And did they offer you prices as good or better [3778] than Borden's? A. Most of the time better, but not, not the type of product that I would like to sell.

Q. And can you identify these dairies for us? A. No, I can't right offhand. They were nondescript, so to speak.

Q. But you would sit down and discuss that with the owners, the fact that you have received an offer from a nondescript company that you were not interested in carrying? A. That's right.

Q. And how many of these conversations about nondescript dairies did you have with the owners? A. I have no idea.

Q. Frequent or infrequent? A. I can't call them frequent because I don't—I don't—I don't have a visit from a new dairy every week.

Q. No. In fact, you had few visits from new dairies? A. I had relatively few, yes.

Q. All right.

One a year? A. Oh, no, no, no. Much more than that.

Q. Twice a year, sir? A. No. Maybe five or six times a year.

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[3795] * * *

Q. Right. A. I can give you an idea, but I can't be specific.

Q. If I should ask you that question for each of the returns in '66—rather, '67, '68, '69 and '70, would your answer be the same, that you cannot tell us how much of that item of expense is allocable to the Hammond store? A. Not from looking at this, no, I can't.

Q. Were you at any time during the period 1966 to 1970 supplied milk by a supplier other than Borden? A. Yes.

Q. Who was your other supplier during this time period? A. Well, it might have been two, or it could have been just Dean. Dean for sure was one of them, and we might have had Kraml, but I am not sure. I can't recall exactly when Dean replaced Kraml.

Q. It may have been during this period '66 to '70? A. It could have been, but I am not positive.

Q. During the period '66 to '70, you had two suppliers in your Hammond store? A. Right.

Q. And how much of the dairy case did they have, sir, the two suppliers? [3796] A. Equal.

Q. Borden had 50 percent and Dean and/or Kraml had 50 percent? A. Correct.

Q. Now, how did the price that you were paying Dean compare to the price that you were paying Borden? A. Lower.

Q. Dean had a lower price? A. Um-hmm.

Q. What? A. Yes.

Q. What about the amount you obtained from Kraml? A. Oh, I can't recall it right offhand. This goes—it might have not even been there at that time. This could conceivably go back ten years.

Q. When you were— A. I am not sure.

Q. When you were being served by Kraml? A. Right.

Q. And did there come a time in 1970 when Dean became your sole supplier? A. In 1970?

Q. In 1970. A. I would say not, because Borden was replaced with Wanzer.

Testimony of Edward Barney

[3797] Now, there might have been a day or two days or something—

Q. No. Well, let's— A. —like that.

Q. Borden was replaced by Wanzer in 1970? A. Well, whenever it happened. I think it was in 1970, April, or something like that, April 1, or whenever, somewhere in that—I can't recall the specific date.

Q. You identified an A&P store in Munster, Indiana, as having been a store that was in or near your store, and is that the one on Ridge Street? A. Ridge Road.

Q. Ridge Road? A. Um-hum.

Q. How far away is that store from your store, sir? A. Approximately a mile; maybe less.

Q. And I am not sure that I, my notes are correct, but you mentioned another store in that area, Hessville? A. Hessville, yes. After thinking, it's 156th Street in Hessville.

Q. How far away from you is that store? A. Oh, it must be in the area of three miles.

Q. And the Homan Avenue store of A&P is how far away? A. Two miles.

* * * * *

[3807] * * *

Q. And to what point in the store was the milk delivered? A. Delivered to our cooler.

Q. Is that a cooler that you could get into from the outside of the store, or did you have to— A. No, you had to come in the store.

Q. Into the store.

And did the driver deposit the milk and the dairy products in the cooler? A. Correct.

Q. And would he rotate the stock in the cooler? A. That was my understanding. Whether he actually did or not, I can't be that certain.

Q. But your understanding is that he did it? A. Um-hum. Could be different.

Q. But it's your understanding that he did, is it not? A. It was our agreement.

Q. All right.

They were supposed to, under your agreement? A. Right.

Q. Did the driver ever place milk and dairy products [3808] into the dairy case? A. That again is something that we had agreed that they would do.

Q. All right.

And he would rotate the stock? A. Now, since I was not actually there, I can't tell you whether he—

Q. You can only tell us on the basis of your understanding— A. That's right.

Q. —and the agreement that you had. A. (Nodding head.)

Q. And would they rotate the stock? A. Supposed to.

Q. Were your stores visited by Borden salesmen? A. Stores?

Q. Stores.

In other words, was your Hammond store visited by the salesman, was your Dolton store visited by the salesman? A. Most of the time any visits from Borden were for me, and they were at my office.

Q. And your office happened to have been— A. Is in Dolton.

Q. —located in Dolton? [3809] A. Right.

Q. But the visit of the salesman would concern Borden's overall dealings with you, including their dealings with you at your Hammond store? A. That's right.

Now, that doesn't say that they did not visit the Hammond store. That I have no way of knowing.

Q. They may have visited the Hammond store as well? A. They could have.

Q. Did you receive point-of-sale advertising, or promo-

tional material from Borden? A. I am sure it was available; whether we actually used it or not, I can't tell you.

Q. Did you ever have demonstrators in your store from Borden? A. Regarding what?

Q. Regarding Borden's milk and dairy products. A. Not to my knowledge.

Q. Did you have any demonstrators in your store in Hammond after it had been remodeled in '68, I believe it was, at the time of its reopening? A. Not to my knowledge.

Q. Did Borden, at that time, supply you with any—what I will refer to as new store opening specials or materials? [3810] A. Could very well. Could very well have.

Q. It was their practice—it was the Borden's practice at this time to do so, was it not, sir? A. I believe that's correct.

Q. And did you receive free merchandise from Borden during this period of time? A. Oh, I don't know about that.

Q. What about in connection with the remodeling and reopening of your Hammond store? A. I don't think that we received anything free. We might have had a special allowance given to us on a certain product, but I don't recall having received free merchandise.

Q. Did you receive an advertising allowance from the Borden Company during this period of time? A. Yes.

Q. And how much was that, sir? A. It varied on the product.

Mr. Soeffing: Now—

By Mr. Curnin:

Q. And did you receive weekly specials from the Borden Company during this period of time? A. Borden put out a, as I can recall, put out a schedule of promotional items—

* * * * *

Testimony of Edward Barney

[3817] Q. Did Borden offer you private label milk during this period of time? A. I don't know.

Q. Did Dean Milk Company offer you private label? A. I couldn't tell you that. I really don't know.

Q. Did Wanzer offer you private label? A. Not that I know of.

Q. Did Wanzer seek to get your business during the period '66 to '70? A. Yes.

Q. When did they first seek to get your business? A. It goes back a few years. I can't really recall how long ago.

Q. As early as 1967, sir? A. I would say so.

Q. And did they offer you prices that were comparable to Bordon at that time? A. At least, yes.

Q. And, in fact— A. I would not change for comparable prices.

Q. And in fact they offered you prices that were slightly better than Borden's at this time? A. If, in order to change, they would have to have been better.

Q. And they did make such an offer to you at that time? [3818] A. I would say so.

Q. During the period 1966 to 1970 did you ever see a— withdraw that.

Were you ever told by Borden at any time during the period 1966 to 1970 that you would receive an additional one percent discount if you would assume the risk of spoilage? A. Not to my knowledge.

Q. Were you advised at anytime during the '66 to '70 period by Borden that you would receive an additional one percent discount if you would do the preordering? A. Not to my knowledge.

Q. Were you buying glass and paper from Borden during the period '66 to '70? A. You are talking about gallon product?

Q. Yes, sir. A. Glass and paper?

Q. Glass and paper. A. Chances are, yes.

Testimony of Edward Barney

Q. Is your store open five or six days a week, sir? A. Seven.

Q. And what are its hours? A. In Hammond?

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[3838] * * *

By Mr. Soeffing:

Q. Did you have personnel which rotated the cases in your store? A. Yes.

Q. Now, you stated that Borden would accept certain spoilage.

How much out-of-date merchandise did the Hammond store have?

Mr. Curnin: If he knows, your Honor.

Mr. Soeffing: If you know.

Judge Hinkes: If you know.

The Witness: Relatively small. I cannot give you a dollar amount.

By Mr. Soeffing:

Q. Now, Mr. Barney, Mr. Curnin questioned you about the fact that Wanzer may have offered you a better price, or made a better offer than Borden. Was this the offer which you finally accepted when you changed to Wanzer? A. Yes.

Q. When was that? A. (No response.)

Q. The approximate year. [3839] A. 19— I believe it was in 1970, but I—I can't be all that positive.

Mr. Soeffing: That is the extent of our redirect, your Honor.

Judge Hinkes: Mr. Curnin.

Testimony of Edward Barney

Recross Examination by Mr. Curnin:

Q. The offer, however, of Wanzer was initially made in 1967, was it not, sir? A. I don't know exactly, but it was sometime prior to—

Q. It was several years prior to the actual change? A. Yes, that is definitely true.

Mr. Curnin: Thank you, sir. I have no further questions.

Mr. Schaefer: No questions.

Further Redirect Examination by Mr. Soeffing:

Q. Was this the exact same price offer?

Mr. Curnin: Your Honor, I believe that the witness has already testified as to that question, and if there is any doubt about it, then I ask that complaint counsel's question to this witness be reread, and we have this answer. I think it has been asked and answered.

[3840] Judge Hinkes: Well, let's reread that. I can't say that I can remember the exact language.

Can you find that, Ernie?

The Reporter: Frankly, your Honor, I really don't know which question and answer he wants.

Judge Hinkes: You are referring to the answer to your question?

Mr. Curnin: No, the answer given to Mr. Soeffing's question.

Judge Hinkes: Let's go back to that.

(Desired portion of record read.)

Mr. Curnin: Asked and answered, your Honor.

Judge Hinkes: Well, I am afraid I can't quite agree with you, Mr. Curnin; when the question says, "Was this the offer," what is the "this"?

I am not so sure that I understand.

Mr. Curnin: Well, read my question and answer to the witness.

Judge Hinkes: Yes.

Mr. Curnin: Then I think it will be clear, your Honor.

(Whereupon, the requested portion of the record was read.)

Mr. Curnin: Let me ask the witness this question, your Honor,—

[3841] Judge Hinkes: We have reached Mr. Soeffing at this point, and with the state of the record as it is, I see no reason for not clarifying this offer and price, so that we are all sure of what we are talking about.

Instead of leaving it to conjecture as to what the witness may have meant, I am going to allow the question and we will hear the answer.

Will you get the last question of Mr. Soeffing?

(Question read.)

By Mr. Soeffing:

Q. Perhaps I can clarify that for you, Mr. Barney.

You told us that you accepted this Wanzer offer later on. You said something about several years earlier.

Were the prices that were conveyed to you by Wanzer several years earlier the exact same prices that you finally accepted later on in 1970 or '71, or whenever you said it was? A. Not necessarily. They—they could have been different, subject to the time that it happened.

Mr. Soeffing: That is the point I wanted to get across, your Honor.

No further redirect.

Testimony of Edward Barney

[3842] *Further Recross Examination by Mr. Curnin:*

Q. My question to you, Mr. Barney, is this, that taking the '67 Wanzer offer, was that comparable to the offer which you received and accepted in 1970 in terms of price? A. Comparable, yes.

Mr. Curnin: Yes. Thank you, sir.
I think that dispels any confusion.
Mr. Soeffing: No further questions from us.
Judge Hinkes: Very well.
Thank you, Mr. Barney. You are excused.
The Witness: Thank you.

(Witness excused.)

* * * * *

Testimony of Paul Peters

July 27, 1973

* * * * *

[3847] Judge Hinkes: You may continue.

Mr. Curnin: Would you read back the last question, please?

(Question read.)

The Witness: My methods don't change.

By Mr. Curnin:

Q. But what about the methods of the Borden driver; did they change, sir, because really, that is what we are talking about, what the Borden driver did, and as separate and apart from the, your method of operation. A. At that time I—I know the driver personally, and the milk was brought right into the cooler.

Q. All right.

Now, when he brought it into the cooler during this period of time, did he rotate the stock when he brought it into the cooler? A. In the cooler, yes.

Q. He did.

And that, he did that both in the October-March period to the June '69-March '70 period? A. This is my method, when any milk man brings milk in, he pulls what is in the far part of the cooler forward—

Q. Right. A. —and puts the new milk in the back.

Q. All right.

[3848] Now, were there ever occasions during this period of time, for anyone of a variety of reasons, where the driver took some of the milk up to the dairy case?

I am not talking about stocking or anything, but just—A. Oh, yes.

Q. Now, were there ever occasions during this period, October to March '67, and June '69 to March '70 when the

driver, for reasons of cooperation or otherwise, or maybe because you knew one another, did he ever put milk in the case? A. No.

Q. That did not occur? A. That did not occur.

Q. All right.

But the others did that I have mentioned, rotating the stock and bringing it to the case, but not putting it in the case? A. Yes.

Mr. Curnin: Thank you, sir.

Judge Hinkes: Is there anything else, Mr. Curnin?

Mr. Curnin: No.

Judge Hinkes: Mr. Scheafer?

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Testimony of Robert Barnes

July 30, 1973

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[3861] * * *

By Mr. Palewicz:

Q. Do you consider discounts or rebates of one or two percent on any product to be important? A. Yes.

Q. Why do you consider them important? A. It's just that much added profit for us that we can make.

Q. Mr. Barnes, how important is milk to your store operation? A. It's one of your leading—leading things.

Judge Hinkes: Try to speak up a little.

The Witness: I'm sorry. It's one of your leading things in the store. People are conscious of milk.

By Mr. Palewicz:

Q. Are there any other reasons besides being one of the leading things in the store why milk is important to your operation? A. As a drawing power, that's all.

* * * * *

[3867] * * *

Q. Mr. Barnes, did you receive any loans from the Borden company during either of the periods October, '66 through March, 1967, or June, 1969 through November, 1969? A. Yes.

Q. Did you repay the loan? A. Yes.

Q. Did you pay interest on the loan? A. Yes.

Q. Did you receive any equipment in connection with your purchases of milk and milk products from the Borden company during either of the stated periods? A. No.

Q. During the periods stated, did you receive any promotional aids from Borden? A. Yes.

Q. And what kind of promotional aids did you receive? A. Advertisement.

Q. What type of advertisements were these? A. Poster, what have you, shelf talk signs—shelf talkers.

Mr. Curnin: May I have that read back, your Honor?

(Answer read.)

* * * * *

[3910] Q. Did Borden assume the risk of loss if there was any spoilage in their products? A. Yes.

Q. You testified earlier this morning that you did receive advertisements and posters from the Borden company on their milk and dairy products, and then you also referred to self-talk signs.

By that do you mean point of sale display cards and signs and banners? A. Yes, right. Little—the cards for on the dairy case and so forth.

Q. Right. You mount them right on the dairy case. A. Right.

Q. And during the '66-'69 period, were you visited by the Borden sales force, Borden representatives? A. Yes.

Q. And would they review with you any problems that you might be having at that time? A. Yes, if we had any.

Q. And might they also be bringing in some promotional material to drop off with you and—and so that you would have handy in the store? A. If they had something, yes, that we wanted.

Q. In addition to this loan which you received from Borden which made it possible for you to open the store, [3911] did you also have an equipment loan with Borden? A. Yes.

Q. And was that for the purchase of an ice cream cooler? A. No, it was a frozen food cooler.

Q. Frozen food cooler.

And what was the frozen food cooler used for? In other words, what products were in there, sir? A. Any of the frozen foods that were brought in.

It was not an open case. It was a walk-in case in the back room that was used for storing frozen foods and ice cream.

Q. Frozen foods and ice cream? A. If we had any surplus that didn't sit in the counter, we kept it there, yes.

Q. They would go into this walk-in cooler in the back? A. Yes.

Q. And did you obtain this loan from Borden which enabled you to open up the store and this loan on this walk-in cooler all as part of your overall dealings with the Borden company in regard—in addition to these, to your purchase of milk and dairy products? A. They were two different times. The loan was given first, and then a while after we were in, we purchased [3912] the cabinet through them.

Q. Right. But that was all and parcel of your overall dealings with the Borden company? A. Yes.

Q. Did you purchase an ongoing business, sir, or was the business closed at the time you purchased it in July of— A. It was going at the time.

Q. It was an ongoing business? A. Yes.

Q. And what—what dairies were serving the store at that time prior to your purchase? A. There was Dixie and Borden's.

Q. And after you got the loan from Borden and opened up the store, it was all Borden? A. Yes.

Q. And that was part of the understanding or arrangement that you had with the Borden company? A. Well, it was just that we were going to take in their milk, that's all, and ice cream.

Q. Now, you mentioned this Dixie Dairy.

Were other dairies operating in the Hammond area during this period, '66 to '69? A. Yes.

Q. Can you name them for us? [3913] A. I can't name all of them. I know Dixie was operating in there. Now, the other ones, I'm not sure.

Q. Was Dean operating in the area? A. I'm not sure.

Q. What about Wanzer? A. That I'm not sure of, either.

Q. Can you name any of the other dairies who were operating in this area, sir? A. No, sir, I can't, not at that time.

Q. During the period '66 to '69, were you approached by any other dairies in an effort to get you to take on their milk and dairy products? A. Not that I recall, no.

Q. Would that have been something that would have been discussed with you, or would they have contacted, in the main, your father? A. They would have contacted both of us.

Q. And you don't have any recollection of any dairies coming in to see you during that period of time? A. Not that I recall, no.

Q. Were you ever told by Borden that you would receive an extra discount if you accepted the risk of spoilage? A. No.

Q. Were you ever advised by Borden during this period of time that you would receive an extra discount if you [3914] did the pre-ordering? A. No.

Q. You mentioned promotional allowances which you received from the Borden company during this period of time.

Did Borden run promotional allowances on dairy products on almost a weekly basis during this period? A. I believe it was pretty close.

Q. And these weekly rebates on dairy items were important in the operation of your business? A. Well, yes, to have a promotional item, yes.

Q. It would help to build traffic in the store? A. Yes.

Testimony of Robert Barnes

Q. Now, during the period 1966 to '69, did the amount of the rebate that you received from the Borden company increase, as best you can recall? A. I thought we had—I thought we had a fairly even keel on our milk. I'm not sure. I'd have to look at the records and find out.

Q. Do you recall during this period of time your asking Borden for an increase in the rebate payment, which they then gave you? A. Could I have the dates on that period?

* * * * *

[3919] Q. And can you tell us who, or did they all at various periods of time use it as a leader? A. Yes.

Q. In other words, during the period '66 through '69, at various periods of time A & P on Sohl, National Cash, Burger, Jewel, and Tittle used it as a leader? A. Yes, if they . . .

Q. Thank you—did you want to add— A. If the Burger store was over there at that earlier date, then they—

Q. They used it as a leader? A. Yes, because the other store had the same price, too.

Q. Did A & P's introduction of the sale of private-label milk during the period of '66 through '69 injure your business? A. Not to my knowledge.

Q. Mr. Barnes, you've mentioned this $40,000 loan from Borden.

Were you paying off that loan throughout the period June of '66 through November of '69? A. Yes, sir.

Mr. Curnin: No further questions, your Honor.
Judge Hinkes: Mr. Schaefer.

* * * * *

Testimony of James Cox

July 31, 1973

* * * * *

[3951] * * *

By Mr. Palewicz:

Q. Why do you consider this important? A. I am lost. I am completely lost. You are going to have to back up.

Q. Do you want me to repeat— A. I would say so.

Mr. Palewicz: Would you read the last question please, and answer.

(Question and answer read, and the pending question was read.)

Mr. Curnin: Your Honor, I believe this is cumulative. The witness has already testified—

Judge Hinkes: No, not yet.

You may answer.

The Witness: Why do I consider it important?

By Mr. Palewicz:

Q. Discounts of one or two percent on any product to be important. A. Well, it's more profit. It pays your bills.

Q. Mr. Cox, how important is milk to your store's operation? A. It was an important factor.

Q. Can you explain that answer, by "an important factor," what do you mean? [3952] A. Well, it was a certain amount of our business. Percentage-wise I can't say—probably ten, between ten and fifteen percent.

Q. Mr. Cox, are discounts and rebates on milk and milk products important to your operation? A. Yes.

Q. Why are they important? A. Well, it's based on your volume; the more you sell, the bigger the profit.

Testimony of James Cox

Q. Now, when you say it's based on your volume, the more you sell the bigger the profit, what do you mean? Can you explain that further? A. Well, I would say the larger the rebate.

Q. From the supplier? A. Yes.

Q. During the period 1966, were you familiar with your store's milk and milk products purchasing practices? A. Yes.

Q. Did you do the purchasing during this period? A. Yes.

Q. How were you billed by Borden on milk and milk products during 1966? A. Daily.

Q. Who did you pay? A. The milkman.

[3953] Q. Was that—by the "milkman," do you mean the driver? A. Yes.

Q. During the period 1966, did you receive any rebate or discounts from Borden off the invoice price of milk and milk products? A. I received a rebate once a month.

Q. You did receive a rebate? A. Yes, once a month.

Q. Once a month.

Do you have any idea how the rebate was calculated? A. It was based on your, the amount of milk you sold. I got 23 percent rebate on everything I sold except if it was a sale item.

Q. And how was the rebate paid to you? A. By check.

Q. When would a rebate for a particular month be paid to you? A. About two weeks, or fifteen or twenty days later.

Q. Would that be after the month, total month's purchases? A. Yes.

Q. Did you receive more than one rebate check per month on milk and milk products from the Borden Company? A. No.

[3954] Q. Did you also purchase ice cream from Borden? A. Yes.

Testimony of James Cox

Q. Mr. Cox, did you receive, during the period 1966, any loans from the Borden Company? A. No.

Q. Did you receive any equipment during 1966 in connection with your purchases of milk and milk products from the Borden Company? A. Not to my knowledge.

Q. During the period 1966 did you receive any promotional aids from Borden? A. Yes.

Q. And what kind of promotional aids did you receive? A. I would say window signs, which you can feature the merchandise.

Q. And how often did you receive these promotional aids? A. I couldn't tell you, but it was whenever they had a sale.

Q. During the period 1966, Mr. Cox, did you ever receive any promotional allowances? A. Yes, I would say so.

Q. And how were these promotional allowances paid to you? A. They would be taken off the bill.

[3955] Q. They would be taken off the bill; what do you mean by that, sir? A. Well, if they give you a sale item they would reduce the price off of your invoice.

Q. Mr. Cox, did you pay your Borden bills promptly during the period 1966? A. Yes.

Q. To the best of your knowledge, was your credit rating with the Borden Company good? A. Yes.

Q. To the best of your knowledge were there any added expenses of collection from you? A. No.

Mr. Palewicz: Mark for identification Commission Exhibits 184-M through 184-R, and 184-T through 184-Z, which consists of U.S. individual tax returns for James R. and Ruth S. Cox, for the periods 1966 and 1965, respectively.

(The papers referred to were marked Commission's Exhibits 184-M through 184-R and 184-T through 184-Z for identification.)

Testimony of James Cox

By Mr. Palewicz:

Q. Mr. Cox, I hand these to you and ask you to familiarize yourself with these documents.

* * * * *

[3994] * * *

Q. Did the Borden Company regularly promote the sale of dairy products throughout the year? A. I would say yes.

Q. Almost on a weekly basis? A. Not quite that frequently.

Q. Bi-weekly? A. Yes, probably maybe every other week.

Q. And these were important in the operation of your store? A. Yes.

Q. And would you receive promotional aids in connection with those sales, window signs or point-of-sale signs? A. Yes.

Q. You testified that you received no equipment from the Borden Company in 1966.

Had you received equipment from the Borden Company at any time prior to 1966? A. No.

Q. Can you recall for us, sir, what your mark-up was on milk and dairy products in 1966? A. I can't.

Q. Therefore you are unable to tell us how it compares with your mark-up on other items carried in the store? A. There is no way I could, I know.

[3995] Q. At this time? A. No.

Q. You testified that there were three chains operating in your area in 1966, Jewel, National Tea and A&P? A. (Nodding head.)

Q. How would you rank A&P in the order of competition with these two chains? A. Have to be third.

Q. And who is first? A. Jewel.

Q. And then National Tea? A. Yes.

Q. And then A&P? A. I would say so.

Q. How does A&P—or did A&P rank with Grocerland? A. Well, just better known, that's all I could tell you.

Q. But the Grocerland store was a more competitive store? A. Well, it was closer.

Q. Right, and more competitive? A. I would have to say so. It's closer.

Q. Did you, at any time in 1965 or '66, receive offers from other dairies operating in your area to supply you with milk and dairy products? [3996] A. It's possible.

Q. Can you recall for us, sir, the dairies that approached you in 1965 and offered to sell you milk and dairy products? A. I don't imagine I can. I can't tell you the name. I don't know if they would be out there.

Q. Can you recall for us the names of the dairies that contacted you in 1966? A. I can't say for sure.

Q. That is because of the passage of time, you can't now recall what happened in '65 and '66? A. Well, that's right. There is no way I can tell you offhand exactly who come in.

Q. And can you tell us whether or not any of the dairies that contacted you in 1965 offered you a price that was equal or comparable to the price you were then paying the Borden Company? A. I would say it would probably be the same, because I didn't switch milk.

Q. Would the same have been true in, for those dairies that contacted you in 1966? A. Yes, I suppose.

Q. Do you recall now whether or not any of the dairies that contacted you in 1965 or 1966 offered you a better overall price, or a better overall deal than you were [3997] then receiving from the Borden Company? A. I can't say.

Q. What dairies were supplying stores in your area in 1965 and 1966? A. Oh, several.

Q. Will you name them for me, sir? A. Wanzer, Hedlin's, Spinney Run, Hawthorn-Mellody, Dean. That's the leaders, I think.

Q. When you say— A. Plus Borden.

Q. Plus Borden? A. Yes.

Q. When you say Wanzer, Hedlin's, Spinney Run, Dean and Hawthorn-Mellody were the leaders, do you mean by that sir, that they were popular brands in your area? A. Well, they were in our area.

Q. And to your knowledge were they popular brands of milk? A. I do think so; they are well known.

Q. When you made these price comparisons in 1966, did you maintain any record of these price comparisons? A. No.

Q. Were you ever advised by a Borden representative in 1966 that you could receive a greater discount if you did the pre-ordering? [3998] A. I don't recall it.

Q. Do you recall any conversation with the Borden representative at which you were advised that you would receive a greater discount if you assumed the risk of spoilage of milk and dairy products in your store? A. I don't recall.

Q. Did your store have any parking, Mr. Cox, in 1966? A. No.

Q. The Centrella Co-operative, did it offer a milk program to its milk customers? A. If you wanted it.

Q. And would you explain to us what that program was, sir? A. Well, it was just a different company.

Q. What company? A. Dean.

Q. Dean milk? A. I am not even sure that was in 1969 or '66. It could have been later, because I really wasn't interested at the time.

Q. Do you recall any of the terms under which you could purchase Dean milk through the co-operative? A. No.

Q. I believe that you may have covered this already, but was it your testimony that in 1966 you priced your [3999] milk and milk products competitively? A. Yes.

Q. You testified that, I believe that there were two A&P stores near you.

Did you compete with both stores, or only one? A. I can't say I competed.

Testimony of James Cox

Q. You can't say you competed with either one of them? A. I won't say for sure I competed with either one, no. They were in the area, that's all.

Q. Right.

Did A&P's sale of private label milk and dairy products in 1966 injure your business? A. They didn't have their private label.

Q. In 1966? A. I don't think so.

Q. In any event you don't recall their having private label in 1966? A. No, sir.

Q. Did you have a walk-in cooler or something similar to that in your store in 1966, Mr. Cox? A. No, sir.

Q. You had a dairy case? A. Yes.

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Testimony of R. John Bitting

August 14, October 24, 1973

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[4242] * * *

Q. Would you turn to your data on the rebate check registers applicable to June 1969? Do you have that, Mr. Bitting? A. I will get it. It is in back of me.

Q. Would you get your check rebate registers for Wilco? A. Yes, sir.

Q. Now, the check register applicable to the June sales by Borden to Wilco is dated July 28, 1969, is that correct? A. That is correct.

Q. The amount of the rebate paid by Borden to Wilco is $725.14, is that correct? A. That is correct.

Q. Now, for June 1969 did you apply an across-the-board discount to all purchases by Wilco of 8.1 percent?

The figure of $725.14 that appears on the check register, is that the same figure that appears on the Borden worksheet, Exhibit 288-T for the month of June? A. Yes, sir.

Q. Does that rebate of $725.14 include a promotional allowance of $83.33 paid by Borden to Wilco? A. Yes, sir.

Q. Do you know what that promotional allowance was for? A. We made a number of endeavors to define that through [4243] various sources, including the Borden officials as well as the Wilco Food Center, and we were not able to determine what the promotional allowance of $83.33 was applicable to other than the fact it appears on the rebate schedule, rebate worksheets for the milk and dairy products.

Q. Therefore, when you were unable to determine what item or items to which you should allocate the promotional allowance, you allocated it proportionately to all items, is that correct? A. That is correct.

Q. Does the same situation apply, that is the situation which references to the promotional allowance and your

allocation to the promotional allowance, apply to the months of July, August, September, October, November, and December of 1966? A. It applies to 1969.

Q. I am sorry, 1969. A. Yes, sir.

Q. It does? A. Yes, sir.

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[4868] The Witness: The dollar sales figure on CX-183, Your Honor, does represent the total dollar figure on a daily basis from the price put for a particular customer. The price book does not set out the unit price for each particular product. It sets out the quantity and then a dollar figure for that day's purchases.

Judge Hinkes: Well, what I want to know is whether the cost to these stores that you used in making comparisons reflect what the store actually paid or whether they reflect the item multiplied by its list price?

The Witness: It reflects the price shown in the appropriate page of the price book on a daily basis for the items purchased, and then the CX-183 also reflects the amount of the rebate memoranda where those did appear for a particular customer.

Judge Hinkes: Forgetting the rebate memoranda for a moment, all I am interested in knowing is whether that price is a calculated price using list price or whether it is the actual price charged to the store before the rebate memoranda were applied.

The Witness: It is the price the driver computed at the time of the delivery and recorded it in his route book for the entire day's purchases.

Judge Hinkes: What price did the driver use; do you know?

[4869] The Witness: We don't know.

Judge Hinkes: Then do you know whether or not the promotional allowances were included in the price that the driver used?

The Witness: Not from the price book information.

Judge Hinkes: Well, do you know it from any stores?

The Witness: On the testimony of Mr. Lasorso on which Mr. Shaffer just read indicates that the case of a promotional allowance that the driver would consider that in arriving at his total billing for that day's delivery as recorded in the CX-183.

Mr. Shaffer: May I just interject with one question at this point, Your Honor, because I do not think that there is any way to tell—let me ask you.

By Mr. Shaffer:

Q. Is there any way to tell whether in preparing the invoice for the store the driver took the figure shown in this book, the route book, entered that on the invoice, and subtracted off either special pricings or discounts of one manner or the other with respect to charge customers we have testimony would treat it in a different way, or whether in the alternative the driver took the special price into account in reaching the total which he reaches? A. We have no way of determining whether it was taken off after the driver totaled up the day's purchases or figured [4870] in a net price before he got to that total for a particular product, subject to the promotional allowance if there was one.

Q. That is right.

Now, as I understand your testimony with respect to Commission Exhibit 183, if the driver took off a promotional allowance before he totaled the figure; in other words, if his total is the net after the promotional allow-

ance, then the dollar amount of sales figure on Commission Exhibit 183 would be something other than the list price for that customer, is that correct? A. It very well could be. Received a promotional allowance.

Q. Right.

On the other hand, if the route book figure reflects the list price for these items, if a particular driver entered the list price for the particular items and then on the invoice which he delivered to the store subtracted the promotional allowance or any other discount, that information would not be taken into account anywhere in either Commission Exhibit 183 or the underlying documents, is that correct? A. I believe that is correct. Mr. Rouse when he submitted these route books to us on November, 1970, testified that they were the records of the accounts receivable between Borden and the customer.

Q. Well, I am not sure that was Mr. Rouse's testimony, [4871] Mr. Bitting. In fact, I think there is testimony in the record that indicates that these books were kept in different ways. I think Mr. Rouse was very careful to point out at the subpoena return and before his testimony before the Commission that there were discounts that were taken off the invoices.

Now, you may be relying on part of his testimony, but the other part of it is the problem we are trying to focus on here.

Now, in distinction to the process which we have just talked about of using the total dollar figure representing the full product line reflected in these books, when you prepared the information shown for A&P on Commission Exhibit 183 is it correct that you took each of the 11 products we are considering, took A&P's invoice price for those products, and extended that price to determine the price actually paid by A&P? A. That's the procedure, yes.

Q. What were the 11 products included in A&P's pur-

chases on Commission's 183-C, Mr. Bitting? A. The 11 products consisted of the Homogenized Milk in the gallon, one-half gallon and the quart containers; 2 Percent in the one-half gallon container; Skim Milk in the quart and one-half gallon containers; Buttermilk in the one-half gallon and quart containers; Chocolate in the quart container; the whipping cream in the one-half pint container; and the Half and Half in * * *

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Testimony of Scott Walker

November 1, 1973

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[5461] * * *

Now I have asked you to please tell us what these facts are and what bearing they have on such butterfat content. A. First, the fact in the bid that the Bowman and A & P label was being offered at the same price or cost to A & P. Second, Mr. Schmidt testified that he did not ask for any specific butterfat content for the homogenized milk beyond the legal requirement. Third, in the Chicago area, in the city of Chicago, the minimum butterfat requirement is 3.25 percent. And fourth, in reviewing the handlers reports for Bowman and for Borden for the period of January, 1965 through March of 1966, I discovered that the butterfat test of the milk processed by Bowman and submitted to the Milk Market Administrator indicated a lower butterfat test than that on the Borden handlers reports. It is therefore my conclusion that had Bowman received the bid the butterfat content in the milk supplied by the Bowman Company would have had a lower butterfat content than that actually supplied by the Borden Company.

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Testimony of Joseph J. Pergler
March 11, 1974

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[5629] * * *

Q. Did you have any responsibilities or duties with reference to the A&P private label program at the O'Hare branch? A. Yes, I did.

Q. What were your responsibilities and duties with reference to A&P's private label program? A. My duties and responsibilities were to rearrange our routes to a point where we could service A&P stores at the time they needed the service and demanded the service.

Q. Were you responsible for the delivery to A&P of its product? A. Yes.

Q. Did you have any responsibility for delivery and service to the other customers served by the Borden O'Hare branch? A. Yes, I did.

Q. Now, did you have any responsibility with respect to the prices to be charged the non-A&P customers served by the O'Hare branch? A. Yes.

Q. What was your responsibility to prices? A. Well, my responsibility there, of course, was to enforce the price list that we had from Borden, our published price list, and in cases where we had competitive problems we met competition at times.

Q. You say you met competition. Do you mean by that that you [5630] departed from the Borden discount schedule? A. The regular discount schedule.

Q. Did you do that under your own authority? A. Yes.

Q. Will you describe the operation of the O'Hare branch and details of its delivery and pricing program? A. At the O'Hare branch—would you repeat that question, sir?

Q. Will you describe the method of operation of the O'Hare branch with particular emphasis on the details of the delivery program? A. As far as the delivery program is concerned, we, of course, had to make certain that our customers received regular and prompt deliveries as close

to a schedule as we possibly could maintain and make adjustments in our delivery schedule as needed.

I am not sure I understood your question.

Q. Perhaps I can ask you some more detailed questions. Will you describe the physical layout of the O'Hare branch of the Borden Company? A. Yes. To begin with, we had a cooler, the approximate size being 135 feet by 50 or 60 feet in width, which had four entrances and exits to it, one in each direction, north, south, east and west, and the front part of the building we had reserve stalls for six trailers that came in with milk from our Woodstock plant.

[5631] All the milk was delivered to us on pallets. We used fork trucks to unload the trailers and put the milk in our cooler with exceptions being toward the end of the period when we were expecting trucks from Woodstock, we would unload the trailers directly into the route trucks.

Then when our loaders were loading the trucks, they would take the milk on pallets again from the cooler directly onto the trucks.

Q. What type of routes were operated out of the O'Hare branch? A. Well, we had company-operated routes that we termed store routes and bulk routes, bulk being where they served restaurants, institutions and hotels, et cetera, that type of business on the bulk routes.

Then we also had independent vendors and distributors.

Q. What is an independent vendor or distributor? A. An independent vendor is a man who operated his own truck, his own route, it was his own business. A distributor is another name for a vendor that had more than one route.

Q. You say operated his own business. You mean he bought the milk from the Borden Company and sold it to whomever he could? A. That is correct.

Q. Were there such sales known as counter-sales at the O'Hare branch? A. Yes, there was. Now explaining

counter-sales, this is [5632] where someone came to our location to purchase milk. It could have been quart milk or in larger quantities, where they paid cash for it.

Now another type of counter-sale that we had was sales to the Navy, for instance, at Great Lakes. The Woodstock plant made the deliveries direct to Great Lakes Training Station via trailers, but they being a processing plant, they had no way of handling the sales of the product to Great Lakes. So we treated that as a so-called counter-sale.

Q. That particular delivery from Woodstock to the Naval station would not have physically gone through the O'Hare branch? A. No, at no time.

Q. Would you describe what a pallet is, Mr. Pergler? A. The best description I can give of a pallet, it is a wooden platform approximately four and a half by five feet in size, and about eight inches high with a supporting board in the center of it, allowing a fork truck to enter between the center board and the two sides and lift it up and carry it to whatever designation we wanted it.

Q. I take it the cases of milk and milk products are stored on the pallet. A. Yes, that is the way we receive it from our Woodstock plant.

Q. How many cases, if you know, are on a pallet? A. There were 30 cases with the exception of gallons of milk which were in glass, there would be 36 cases then.

* * * * *

[5639] *By Mr. Foley:*

* * * * *

Q. Now after the Tripp Avenue plant was closed down at the end of 1963 and the O'Hare branch was opened at the beginning of 1964, how many store routes did Borden Company operate out of the O'Hare branch? A. Twenty.

Q. So it went from 26 to 20? A. Twenty.

Q. Was there any further reduction after the beginning

of the opening of the O'Hare branch? A. When we first moved to—yes, we reduced it finally to 13.

Q. Will you describe what happened and at what stages it went from 26 to 13 and, if you know, what were the reasons for the reduction in store routes? A. Number one, when we closed the Tripp Avenue plant we made a consolidation of some of our routes to reduce that number from 26 to 20. So when we moved into O'Hare we had 20 company store routes. After we went into the private label program with A&P it afforded us an opportunity to reduce the number from 20 to 13 by this private label program that we entered into with A&P.

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[5647] * * *

Q. How many doors were there on the Borden delivery truck? A. Two. One side door and rear doors.

Q. Was it the idea of the program to load the truck in such a manner as to get the product off the truck as fast as possible? A. Yes.

Mr. Mathias: Your Honor, I am going to object to the leading of the witness again, such as "Was it the idea of the program . . ."

Mr. Foley: I withdraw the question.

Judge Hinkes: Very well.

By Mr. Foley:

Q. Mr. Pergler, you have given us some of the details of the private label program from Borden to A&P. Are you familiar with the details of the services which were provided to A&P under the private label program? A. I am not quite sure I understand your question, Mr. Foley.

Q. Do you know what services Borden was to provide to A&P under the private label program that was in effect after November 1965? A. Yes.

Testimony of Joseph J. Pergler

Q. Would you describe the terms and conditions of the private label program. A. Number one, by getting into the private label program [5648] we had what we termed the drop delivery. Our man just delivered the milk into the back room or their cooler. He did not stack the dairy case. As stated previously, they had to have the next day's order ready for our man so that he would know what their needs would be. They also had to have all the empty cases ready for him at the back door, stacked neatly enough for him to remove from their premises in an orderly fashion.

There were to be no special deliveries and also we were not taking out any outdated merchandise from the A&P stores. The only thing we ever gave them credit for were containers of product that was directly our fault.

[5649] Q. Mr. Pergler, was there any practice under the private label program with reference to A&P's ordering of split cases or full cases of a product? A. Well, we insisted upon them ordering their major items such as quarts, half-gallons and gallons of milk and pints of half-and-half in full cases. The minor products such as quarts of chocolate, quarts of buttermilk, sour cream, that they could order in less than case quantities.

Q. What did the A&P store manager, whoever it was, from A&P that gave the Borden order, on what kind of document did you give this order? A. It was what we termed a chainstore ticket. It was a delivery ticket as well as an order ticket. It served a dual purpose.

Q. Was there a separate delivery ticket for private label purchases and for Borden label purchases to each of the A&P stores? A. No, this was one complete ticket. It had both private label and Borden product listed on it.

Q. How did A&P and its stores comply with the terms and conditions of the private label program?

Mr. Mathias: Your Honor, I am going to object unless there is some foundation laid for the question.

Mr. Foley: I think the witness has testified he was the man responsible for the delivery system, he supervised the [5650] operation of the deliverymen, he was responsible for all the operations of the O'Hare Branch.

Mr. Mathias: There has been no testimony he participated in any of the deliveries.

Judge Hinkes: Perhaps your question should be limited to his instructions on delivery inasmuch as we have nothing to indicate that his instructions were followed. Perhaps they were different from his instruction.

By Mr. Foley:

Q. Mr. Pergler, did you give instructions on delivery to the Borden drivers? A. Yes, I did.

Q. What instructions did you give them? A. I outlined to them the terms of the private label program we had with A&P and I had asked them to report directly to me in the event that there was any lack of compliance on the part of A&P store personnel.

Q. Did you receive reports from your drivers? A. Yes. I did and they were all very satisfactory. They had a hundred percent cooperation from the store personnel.

Q. Now you previously mentioned the pallet system of delivery from Woodstock. Was this the same type of delivery system that was effected at Trip Avenue? A. No, it wasn't. At Trip Avenue we had the bottling plant in conjunction with the branch. Our type of loading there was [5651] manual. In other words, we loaded the trucks manually by dragging off of a platform into the truck five cases of milk at one time. This is the reason why we used as many men in loading and unloading at Trip Avenue versus what we used at O'Hare Branch. It was the manual operation versus the pallet-type operation.

Testimony of Joseph J. Pergler

Q. Mr. Pergler, once again just to clear up a point, do counter sales include sales to Borden vendors? A. No.

Q. Now were you familiar with the expenditures of Borden's O'Hare Branch? A. Yes.

Q. And in particular were you familiar with the petty cash disbursement made out of the O'Hare Branch? A. Yes.

Q. Can you tell us, Mr. Pergler, were any of the petty cash disbursements at the O'Hare Branch used for the service of A&P? A. No, they were not.

Q. What type of service was being received by the non-A&P customers of Borden on the O'Hare Branch? A. Well, the non-A&P customers received what we would term a full service-type delivery. This entailed our man putting into the store the amount of merchandise he thought they would need. He stocked their dairy case. He would remove all outdated merchandise and give them credit and then he would collect, as a [5652] rule, cash daily on his deliveries.

Q. Who would make out the order? A. Our man would make it out, sir. Our man did everything at the store. The storekeeper did nothing.

Q. Would the Borden driver in delivering to the non-A&P customers make entry in his route book as to the quantity of product delivered? A. Yes, he would. Each day he would enter into the route book the amount of merchandise he had left and the amount of monies he had collected or the amount of monies that were charged that particular day.

Q. Were route book entries to be made by Borden's drivers to the A&P stores? A. No, there was no need for that once we got into the private label.

Q. Why was there no reason for that once you got into the private label? A. For the simple reason that there was no money changed hands and the store tickets were computed at our Kilborne Avenue location.

Testimony of Joseph J. Pergler

Q. What is the Kilborne Avenue location? A. That was our general office, district office.

Q. So the drivers did not collect any payment from A&P stores? A. None whatever. The billing to A&P was done from our Kilborne location.

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[5664] *By Mr. Foley:*

Q. When was it that you enjoyed this authority, Mr. Pergler, to vary the discounts? A. We are talking about the O'Hare branch. From 1963 to the time of my retirement.

Q. During your entire tenure there? A. Right.

Q. Now I direct your attention to Floom Bros., Mr. Pergler. I ask you whether Floom Bros. received the published discount or whether it received some other discount. A. They received some other discounts, sir.

Q. What discount was that? A. They were members of Consolidated Foods. They would receive at least two percent more than what they would earn.

Q. When you say "greater than what they would earn," you mean greater than what they would earn under the published discount schedule? A. Yes, sir.

Q. Directing your attention to Greenview Fruit, are you aware of what discount Greenview received? A. Yes, they would also receive more discount than what they would earn. They were also a member of Consolidated.

Q. Now with reference to this one other customer for whom no discount was given, and that is Madison La Veigne, at the top of the second page, 183B, do you know what discount Madison [5665] La Veigne received? A. Yes, they received more than what they would actually earn on their own.

Q. Did Borden sell its dairy products to its customers in Chicago out of the O'Hare branch in accord with the published discount schedule in February and March 1966,

Mr. Pergler? A. Would you repeat that question again, sir?

Q. Did Borden sell its milk and dairy products to its non-A&P customers in Chicago out of the O'Hare branch in accordance with its published discount schedule? A. Yes.

Q. You have just given us three or four cases where the Borden Company granted a higher discount rebate. A. Yes.

Q. Were there any other customers who received higher discounts? A. Yes, that are not on this list.

Q. Even on the customers on this list—

> Mr. Mathias: Your Honor, is Mr. Foley trying now to impeach his own witness?
>
> Mr. Foley: I am not.
>
> Judge Hinkes: Well, in any event, I will let you continue, Mr. Foley.

By Mr. Foley:

Q. Previously, Mr. Pergler, you made reference to your authority [5666] to change the discount schedule for customers. When did you have occasion to do that? A. Well, I changed them at times when we had a competitive situation where some of our competitors went into our customers and offered greater discount. In order to retain the business, I met the offer that was made to them.

Q. Did this happen very often in 1966? A. It was quite frequent, I would say. In all cases, however, we did not give any additional discounts.

Q. Only sometimes you gave additional discounts? A. Only sometimes.

Q. How did you know that your competitors were offering higher discounts than you were? A. Usually our store keepers would notify us that they had been there and what they had been offered and told us if we wanted to main-

tain the business, we would have to meet it or come as close to it as possible.

Q. Now, Mr. Pergler, once again directing your attention to Commission Exhibit 183 and calling your attention to Bill's Market—Bill's Market appears on 193A at the location of 6649 North Clark Street—it is near the bottom of the page—do you see that? A. I see it.

* * * * *

[5690] Mr. Foley: I recall on Mr. Mathias' objection Your Honor previously ruled we were not to pursue the question after Your Honor ruled on it.

Judge Hinkes: This is a new objection. I will overrule the objection in any event. I think it is the type of hearsay which could be allowed in this proceeding.

You may answer what did you learn.

The Witness: I learned there was deviation on the part of other dairies from the published lists and discount lists.

By Mr. Foley:

Q. How common a practice was this? A. It was quite common in the market. It was quite common in the market, to answer your question.

Mr. Foley: I have no other questions.

Judge Hinkes: Do you have any questions, Mr. Schaefer?

Mr. Schaefer: No, Your Honor. This whole subject, as I understand, relates to counts 1 and 2, so we have no questions.

Judge Hinkes: Very well. You may cross-examine.

Mr. Mathias: Your Honor, could we have a five-minute recess to put our notes together?

Judge Hinkes: Very well, we will take a short recess now.

(Whereupon, a brief recess was taken.)

Judge Hinkes: Mr. Mathias, you may cross-examine.

* * * * *

[5693] * * *

Q. During the time Mr. Gose was there would Mr. Hedin or Mr. Sorensen report to him? A. Yes, sir.

Q. Now, Mr. Pergler, you stated that you gave instructions to the route men in the O'Hare Branch in connection with the A&P private label program. Were those written instructions, sir? A. They were verbal.

Q. And the reports which you received back from the route men, were these in written or verbal form? A. Verbal form.

Q. Mr. Pergler, you were asked a number of questions concerning counter sales. I think you defined them approximately as sales to someone who came to the O'Hare Branch location to purchase milk; is that correct, sir? A. That is part of it, yes.

Q. You also mentioned sales to the Navy, at the Great Lakes Station? A. That is correct, sir.

Q. What proportion of your counter sales were accounted for by the sales to the Navy at Great Lakes? A. About 99.5 percent, or 99.8 percent, sir. The counter sales to people coming to the location to purchase milk were just about nil.

* * * * *

[5727] appearing in the published discount schedules of Borden that there is also a two percent discount available for central billing to groups. Is this correct, sir? A. That is correct.

Q. Is this the two percent to which you referred in connection with Floom Brothers? A. Yes, sir.

Q. Would this be the additional discount also mentioned in connection with the other three, Misicka, Greenview— A. No, Misicka was different.

Q. Was Misicka a member of any group? A. Consolidated.

Q. He was a member of the Consolidated group? A. Yes.

Q. Did he receive two percent for central billing? A. Yes, sir.

Q. What about Greenview Fruit, were they a member of Consolidated? A. I am a little hazy whether it was Consolidated or Grocerland. In all probability it was Consolidated.

Q. They were a member of a buying group? A. Yes, either Grocerland or Consolidated.

Q. They would receive two percent discount for central billing as well? A. Yes, sir.

[5728] Q. In the case of Madison LaVeigne, was this store a member or any cooperative group? A. Yes.

Q. What cooperative group, if you can recall? A. I think it was Consolidated.

Q. Would they also have received a 2 percent additional discount for central billing? A. Yes, sir.

Q. Now, you say that Misicka was different from Floom Brothers. What did you mean by that, sir? A. We had a competitive situation there where some competitor went in there and offered him a larger discount. In order to retain the business we had to meet that discount.

Q. In the case of Greenview Fruit, what was the circumstance there? Was it a competitive discount as well, or was that the 2 percent central billing? A. To the best of my recollection, he got the two percent central billing.

Q. And Madison LaVeigne? A. That likewise was the same situation.

Q. The 2 percent additional? A. To the best of my recollection, sir.

Testimony of Joseph J. Pergler

Q. Now, Mr. Pergler, you were asked some questions about the published prices and discount schedule of Borden's competitors. You stated that you were aware that some of your [5729] major competitors, such as Bowman, Dean and Wanzer, and you may have mentioned some others, did have some published schedules. You were also asked if these competitors adhered to the published schedules.

Did you learn from your customers that there was deviation from these published schedules? A. Yes, sir.

Q. Now, Mr. Pergler, you would only be likely to hear of any deviations from the schedules, is that not correct? A. Yes.

Q. In other words, your customers would not be calling it to your attention when they were only offered the regular published list price plus published discount schedule, is that correct, sir? A. Well, they would let us know that our competitors had been in there making a solicitation even though it might have been at their published discount prices.

Q. Unless those published prices varied quite differently from Borden they would not call them to your attention, sir? A. No.

Q. Were there some occasions when a competitor would come out with a new discount schedule which appeared to offer a little better price than Borden and this was called to your attention? A. Yes, sir. I may be leaving a wrong impression here in

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[5743] * * *

Q. How successful were you in 1966 on the O'Hare route in getting paid from the customers in accordance with the published discount schedule and published price list? A. To the best of my recollection I would say with the exceptions of those cases where competitors had been in offering inducements we were quite successful.

Testimony of Joseph J. Pergler

Q. Of the customers listed on CX-183, for example, if you will look that over, do you have any idea how many of them received only that to which they were entitled under the published discount with the possible two percent extra if they were getting the central billing feature? A. I think all of them except two would receive something additional.

Q. All of these customers would receive something additional? A. Right.

> Judge Hinkes: That is additional beyond the two percent for central billing?
>
> The Witness: Beyond our published discount price.
>
> Judge Hinkes: The question combined both, your published discounts and the two percent central billing. Did [5744] they get more than that?
>
> The Witness: Yes.
>
> Judge Hinkes: All of them?
>
> The Witness: All except two to the best of my recollection, sir.

By Mr. Foley:

Q. Was this in response to competitive conditions? A. Yes, sir.

> Mr. Foley: May I see W-13, Mr. Mathias? Do you have W-13 for March? I guess that is it.

By Mr. Foley:

Q. Mr. Pergler, directing your attention to Route Book W-13 for March 1966 and the pink slip in the front of that book entitled "Office charges for special orders," are you familiar with that form, sir? A. Yes.

Q. What is that special order form used for? A. This is for a special delivery to a customer.

Testimony of Joseph J. Pergler

Q. When you see this slip here does this indicate to you that the A&P Store identified there at 1227 Harlan Avenue received a special delivery on that date? A. Yes, sir.

Q. Would you have any explanation as to why that should have taken place under the private label program? A. Yes. So I may clarify some misunderstanding here, I want [5745] to say when the program went into effect, gentlemen, we conscientiously tried to enforce all the terms of the agreement between A&P and the Borden Company relative to the private label program. However, to break a habit of years standing with some of the men took time and patience to correct. Eventually we corrected all these inequalities, so to speak, where the men were keeping records in the book where they weren't supposed to. They had to be constantly corrected in that respect. The same with specials.

Now, the special deliveries came about in two ways. This we corrected almost instantly. It is quite possible that our man was shorted on his load by the loaders, where he did not get his full load. It is possible that our man made an error in computing the order for the day on particularly the Borden label product which in this case indicates that he had a special for Borden. Or when our man was serving some of the independent stores prior to getting to A&P he had received orders from the independent stores which were in excess of what he anticipated the needs would be. So as a result, when he got to the A&P Store he found he was short of merchandise and asked that special delivery be made.

Judge Hinkes: You say all this is possible, but do you know what happened here?

The Witness: Sir, on this particular case, no.

Judge Hinkes: Very well, you may go on, Mr. Foley.

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Testimony of Samuel E. Dean

March 13, 1974

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[5959] * * *

Q. To your knowledge, did these competitors of Dean deviate from the published price and discount schedules in an effort to obtain business? A. Why they deviated, I would only be assuming, Mr. Counsel. It might have been to accomplish the purpose you are talking about. It might have been because a competitive price was offered from somewhere else that required them to deviate from it.

Q. But they did deviate from the published discount schedule? A. Yes.

Q. Was that true of the Borden Company during this period of time? A. Yes.

Q. Can you tell us, Mr. Dean, who is the first to introduce private label milk in the Chicago market? A. I take it when you say private label, you mean a house controlled brand and not simply an unnamed brand?

Q. Yes, that is correct. A. The first one we can recall, or I can recall, in Chicago, is one we managed for Jewel Food stores under the name of Yummy. This was in the early 1950's.

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[5966] Q. Was that in all sizes or just one size? Was it in the quart, half gallon, gallon? A. My recollection is it was in the quarts and half gallons.

Q. To go back to the 1950's, when this was first introduced, what was the wholesale cost differential between the Yummy label and the Dean label?

Mr. Curnin: Objection, Your Honor. Far beyond the scope of the direct examination.

Judge Hinkes: I don't think this witness was questioned about any costs as such.

Mr. Mathias: He was questioned about the costing of Jewel of this product and I think this opens up the door—it is relevant for a full inquiry to find out what the cost differential was to Jewel.

Judge Hinkes: It may be relevant but with the ground rules that have been laid, I must insist that the cross examination be limited to the area of the direct examination and I will have to sustain the objection.

By Mr. Mathias:

Q. Mr. Dean, you were asked some questions concerning Dean's sales to Centrella stores and Grocerland stores and the number of stores that were involved in your sales to these 2 voluntary groups. In the case of Centrella stores, did Dean serve many Centrella stores? [5967] A. No.

Q. And in the case of Grocerland, did Dean serve all Grocerland stores? A. We served all of the bigger ones. We couldn't afford to serve the small ones.

Q. You did not serve the entire voluntary group? A. No.

Q. Now, Mr. Dean, you were asked some questions concerning your familiarity with Borden's pricing policies and their discounting policies. How would you become acquainted with the pricing practices of the Borden Company?

Mr. Curnin: May I have that question read back?

Judge Hinkes: Would you read back the question?

(The pending question was read by the reporter.)

Mr. Curnin: I would object to that question, Your Honor. Familiarity with Borden's pricing policies —I think it is so broad it may be incapable of being answered, but in any event, my question was limited

to Borden's use by Borden of a published discount schedule, deviations from a discount schedule. I did not go through the general range of Borden's pricing policies.

Judge Hinkes: That is correct. I think you will have to limit yourself to that particular subject matter. I think that pricing policies covers a very much greater area than simply published prices and deviations therefrom.

[5968] Mr. Mathias: Well, by—strike that.

By Mr. Mathias:

Q. Mr. Dean, how would you become aware of deviations by Borden from their published discount schedules? A. We might both serve some Centrella stores, for instance. The minute you get into that position, everything you put out goes to your competition, if they are serving other ones than what they put out ultimately is made available to you, not by Borden, but the customers that receive them.

Q. If a customer receives an offer from Borden, that customer would report it to Dean? A. If it was more advantageous than the price he was getting from us, yes.

Q. Would this always be a deviation form Borden's published discount schedule or might it be Borden's published discount schedule? A. It could be either.

Q. Mr. Dean, you mentioned the experience of Jewel in the 1950's when it reduced the price on Yummy and created a differential between Yummy and the Dean brand. After Jewel opened its own dairy and started producing its own milk and selling its own milk in its stores, do you recall whether, at any time, it reduced the price on milk?

Mr. Curnin: Objection, Your Honor. One is to [5969] foundation. Two, it is beyond the scope of direct. He was asked only about Jewel's retail

pricing at the time of the introduction of private label in the early 1950's.

Mr. Mathias: I think I should be able to explore whether or not Dean, at any other time in the course of the time period covered by Mr. Curnin's direct, reduced the price on private label.

Mr. Curnin: Dean or Jewel?

Mr. Mathias: I mean Jewel—excuse me.

Judge Hinkes: I think this is sufficiently tied in to what this witness has already spoken about and I think I should allow it.

Mr. Curnin: May we establish foundation?

By Mr. Mathias:

Q. Do you recall the question or would you like to have it read back? A. I would like to have it read back.

Q. Would the reporter please read the question back to Mr. Dean?

(The pending question was read by the reporter, as follows:

"Mr. Dean, you mentioned the experience of Jewel in the 1950's, when it reduced the price on Yummy and created a differential between Yummy and the Dean brand. After Jewel opened its own dairy and started producing its [5970] own milk and selling its own milk in its stores, do you recall whether, at any time, it reduced the price on milk?")

The Witness: As of this moment, I don't recall any on milk as milk.

By Mr. Mathias:

Q. Mr. Dean, during this period of time which you are being questioned, particularly between 1965 and 1970, did Dean attempt, in its sales to its various customers, to

adhere to its published price lists and discount schedules? A. Yes. That was the purpose in putting them out.

Q. Now, Mr. Dean, you mentioned that Dean sold primarily through retail grocery stores—wholesale to retail grocery stores, and where you did acquire retail business or bulk institutional business, you attempted to get rid of it as soon as possible. Now, is the Chicago area, does Dean sell to schools? A. No.

Q. To restaurant chains? A. No.

Q. To airlines? A. Not as part of the company's sales program. We have distributors who may sell to schools, I don't know. We wouldn't know of them. They may sell to airlines, we wouldn't know of them. We do not, as part of our own company operation service that type of an outlet.

[5971] Q. No further cross, Your Honor.

Mr. Curnin: One question, Your Honor.

Redirect Examination by Mr. Curnin:

Q. Did the Dean Company deviate from its published price and discount schedule during the period 1965 to 1970? A. Yes.

Q. No further questions.

Judge Hinkes: Anything else, Mr. White?

Mr. White: No questions.

Judge Hinkes: Thank you. You may step down.

(Witness excused).

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Testimony of Frank T. Cannon

March 15, 1974

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[6125] *By Mr. McInerney:*

Q. Approximately when was that? A. I am guessing, the month of July sometime in the year 1965.

Judge Hinkes: Now is that Elmer Smith or Schmidt?

The Witness: Elmer Schmidt.

By Mr. McInerney:

Q. Would you give us the substance of that conversation, please? A. As best I recall, there was very little conversation on the telephone other than he wanted me to come over and discuss with him the possibility of our making a bid for all of their fluid milk business.

Knowing Elmer as well as I did, I am sure there was some small talk, but I did visit him in the next day or two, maybe that very day, I don't recall exactly.

Q. Tell us, please, what he said to you and what you said to him on the occasion of that visit. A. Well, on that first visit—I might add I discussed it with my superiors first, who I reported to was the president of the company, and we were trying to protect ourselves from the fact it might be a fishing expedition, as we called it, just to find out what the pricing level was in the market. I went in with that not maybe as objective a look as I should have.

I went in and discussed it with him and went over the long time it took to make a quotation. He said he wanted it in [6126] detail. I told him it would take some time to do this and I was hopeful he was serious about it, and he assured me he was, that this was open for bid and others would be asked to bid also, meaning others than the Borden Company. They were going to be asked also, as I

understood it. That is the best recollection I have of that first visit.

I beg your pardon, there was one thing he was very emphatic about because it happened on occasion where people made bids and couldn't live with it; he wanted to make sure we had some profit in the bid for ourselves.

Q. Did he tell you why he wanted to be sure? A. This was the Tea Company policy as far as I knew.

Q. Where was this conversation? A. This was in the Tea Company offices on Pulaski Road in Chicago.

Q. Did Mr. Schmidt have an office there? A. No, sir, he did not have an office. He sat out at a desk very similar to one of these desks you see down in front of us here, and right next to him on the other side was his secretary and on down the line from him were rows of buyers sitting at desks the same way.

Q. Now in the course of that conversation did Mr. Schmidt tell you how many stores were to be served? A. He gave me a list of the stores. I just don't recall the number but they are in the exhibit here. He gave me the total [6127] list of stores that we were to bid on in Indiana, Iowa, and Illinois and Southern Wisconsin, too—I think there are some in Southern Wisconsin in that quotation.

That is the only specifications or the only information he gave us to work on, that these are the stores, you bid on them.

Q. You mentioned—just to make sure, maybe I'd better ask the question a little differently.

How long did you anticipate it would take to work up this bid? A. Keeping hard at it, it would take two or three weeks' time.

Q. Did you so indicate to Mr. Schmidt in the course of this conversation? A. I did, I was very emphatic about it.

Q. Why would it take that long? A. The Tea Company

was very precise in what they accepted from you in quotations. I think my exhibit that I brought to you will show that.

We had to show the marketing areas, the locations, every area in it, plus across the board how we broke down our cost to them, from the cost of product into the silos, processed, the mark-ups, everything had to be in detail for them when you made a quotation.

This was our practice over the years.

* * * * *

[6131] supplying milk to A & P sometime in 1965, did you speak to anyone else at A & P with respect to that, other than Mr. Schmidt? A. No, sir, I did not.

Q. Did you speak to other people in Bowman with respect to that subject? A. Yes, sir.

Q. Did anyone else from Bowman, to your knowledge, discuss the subject with anyone from A & P; that is, other than yourself? A. Not to my knowledge, no, sir.

Q. What was your next contact with Mr. Schmidt subsequent to this meeting that you have just described sometime in July of 1965? A. I don't quite follow you, Mr. McInerney. Would you say that again, please?

Q. I think you told us about a meeting you had with Mr. Elmer Schmidt in July of 1965 and at this time he requested a bid or quotation from Bowman, and I was going to ask you what your next contact with Mr. Schmidt was on that subject. A. All right, sir.

Before I made my next contact, of course, we prepared this document, this series of exhibits here.

Q. Let me interrupt a moment and ask you how that was prepared. A. That was prepared by our senior cost accountant, Dave Parmalee. He did a great deal of the cost

work on it, with some help from myself. Most of our evenings were spent in preparing [6132] this. We tried to keep it as quiet as possible and not excite anybody in the Bowman Dairy as to the possibilities of our securing a large-size account such as this.

Things seem to travel very rapidly in the dairy industry, and we worked evenings, just he and I alone, and on occasion our attorney, L. Edward Hart, also sat in with us and discussed some of the cost factors with us.

Q. Do you recall the name of Mr. Hart's firm? A. Yes, it is Montgomery, Hart, Pritchard & Harriet.

Q. Where is that law firm or was that law firm? A. In Chicago.

Q. Is it still in Chicago? A. To the best of my knowledge it is, but Mr. Hart is now deceased.

Q. What was the reason for discussing with Mr. Hart? A. Well, our total sales organization was pretty well under Mr. Hart's supervision back from a judgment that had been rendered somewheres around 1953.

Q. Do you recall the name of the case? A. Yes, the Bowman Dairy Company v. The Federal Government; and then there was some civil action, and I don't know the terminology of it, by the Dean Foods Company.

Mr. McInerney: Would you mark this for identification as A & P Exhibit 51.

Mr. Mathias: May I have the opportunity to briefly [6133] review this before it is shown to the witness?

Judge Hinkes: Certainly.

Mr. Mathias: I was handed it just before the hearing and was engaged in other work and was unable to review it.

Judge Hinkes: You may.

Mr. Mathias: All right, Mr. McInerney.

Testimony of Frank T. Cannon

By Mr. McInerney:

Q. Would you look at RAPX 51 and tell us, is that the Government decree to which you had reference in your previous answer? A. Yes, sir, this is it.

Q. And I believe you said that subsequent to this decree Mr. Hart was pretty much in charge of your sales operation. Why was that? A. Well, yes, he was, in this respect, that so much of my duties had to be cleared through Mr. Hart, or Mr. Hart's office in his absence. We were compelled, because of this restraining order or final judgment or whatever term this is, that we had to have list price and work on a discounted basis on the amount of milk sold to a store.

In other words, every store had the same list price and they were rebated a certain amount of money at the end of the month by check according to their category that they fell in.

Now if we had to deviate in any way from that list price—list discount system, I had to have my salespeople bring in an affidavit that would be signed by the person that claimed [6134] that they had a better competitive offer, whether it would be a better price or a piece of free equipment or a loan without interest, anything that deviated from that list-less-discount had to be verified in writing, certified by the storekeeper or the customer's signature, with our own salesperson signing it also as seeing the signature; and in turn I had to approve it and take it to Mr. Hart's office for clarification and understanding that we could meet the conditions that existed in that particular account.

Mr. McInerney: I offer A & P Exhibit 51-A and subsequent letters in evidence.

Mr. Mathias: No objection.

Judge Hinkes: It is received.

Testimony of Frank T. Cannon

(The document referred to was marked Respondent A & P Exhibit 51-A through -G for identification and received in evidence.)

Mr. McInerney: That is 51-A through -G, may the record note.

By Mr. McInerney:

Q. Before you brought your letter of August 31, 1965, your letter offer over to Mr. Schmidt, was this proposal reviewed by anyone else on behalf of Bowman? You mentioned the senior cost accountant, Mr. Parmalee; the attorney, Mr. Hart; and yourself. A. Yes, sir, it was reviewed and agreed to that I make the presentation, by our president, who was then T. J. Kullman, and [6135] our board chairman Francis Kullman.

Q. Would you tell us what happened next. I am going back now to a point where I interrupted myself and you, and I apologize. What was your next contact with Mr. Schmidt with respect to this proposal subsequent to the meeting you describe in July 1965? A. I believe the exact date that is on the letter, I presented that proposal to Mr. Schmidt at his office on Pulaski Road in Chicago.

Q. What did you say to him, and he to you, on that occasion? A. He reviewed it thoroughly. When I say "thoroughly," I mean by asking me a question or two as to the areas and servicing of the accounts and such things as this, could we handle it, could we reach certain areas, because it was in far-reaching areas, but we did have branch offices or branch distribution stations every place that is mentioned in that contract we could have reached within reason of delivery systems.

We didn't get too deeply involved in the other details. He wanted to study it, meaning the pricing.

As I recall it, our meeting was not too long at that time.

Q. What was your next contact thereafter with Mr. Schmidt with respect to this? A. Again guessing at time periods, it was a week or so or maybe a little bit longer, I had a phone call asking if I would come back to the office to discuss in detail some of the points that he had gone over with his superiors at the Tea Company.

[6136] So we subsequently made a date for me to come over, and he reviewed the private label pricing with the standard label, as we call it, or the Bowman label, and why we would sell them both items at the same price. I discussed my own and our company's philosophy on that.

Q. Please tell us as best you can recall what you said to him. A. I am not a cost accountant, but in working with our cost accountants over the years and our own knowledge of cost, we could not substantiate in any way a differential between private label and brand label or standard label. We could see no savings to be had in it.

So this was our philosophy, that we could sell them either one at the same price but we didn't care to go into low-volume items in private label.

The offer was made on some around 10 or 11 or 12 items that we would give them private label or our own label, either one. All other of the 20-some items we bid on would be on the Bowman label, meaning the low-volume items.

Q. You mentioned this was your philosophy and Bowman Dairy philosophy that you would sell both at the same price, private label and brand label? A. That is correct.

Q. Are you aware other companies have different philosophies? A. Yes, sir, I am.

In our own company we had a private label we were putting [6137] up, not in fluid milk but in ice cream, and we sold it at the same price we did our own standard brand label to the same customer.

Q. Bowman was consistent in that? A. Yes, sir. To the best of my knowledge I cannot recall that we ever had a differential between a private label and a brand label.

Q. Are you aware whether or not competitors of Bowman had a different philosophy and gave lower prices for private label? A. Yes, sir, I am aware of it.

Q. What was their philosophy?

Mr. Mathias: Your Honor, I will object to speculation as to philosophy for competitors unless there is some foundation as to how his knowledge was gained.

Mr. McInerney: I think his experience over decades, I think it is now 40 years in the industry, I think he is qualified to answer the question.

Judge Hinkes: Only if the philosophy, which involves a mental response, was communicated to the witness. I think you would have to demonstrate that he knew their philosophy, which is something different from knowing their practice.

Mr. McInerney: I will rephrase the question.

By Mr. McInerney:

Q. Have you from time to time, Mr. Cannon, heard from customers of yours that they could obtain better prices on private [6138] label milk and dairy products than on brand label milk and dairy products? A. Yes, sir.

Q. And do you know, as a result of those conversations, that competitors of Bowman have regularly offered lower prices on private label milk and dairy products?

Mr. Mathias: I will object to that as being far too broad in view of the response; a regular practice as a result of reports from some customers.

Judge Hinkes: I will sustain the objection.

Perhaps you should ask the witness what he learned from the customers, Mr. McInerney, and I think that would be much preferable than suggesting what he learned.

Mr. McInerney: Very well.

By Mr. McInerney:

Q. Would you tell us in your own words what, in general, you have learned from customers of yours, Mr. Cannon, with respect to the practices of other dairies on pricing private label as compared with brand label products? A. Shall I say in the realm of my period of time with the Bowman Dairy Company?

Q. That would be fine. A. Yes, there was a major company in the Chicago market I was well acquainted with that I knew their practice very well of offering private label and they did offer private label to the I.G.A. stores in Chicago at a lower than their own brand label.

[6139] Q. Have you become aware of other competitors who have similarly priced private label offers at lower prices than their own brand label? A. Yes, sir.

Q. On the basis of that experience is it fair to conclude that other companies have a different philosophy with respect to private label pricing than Bowman did?

Mr. Mathias: Again we are getting back to philosophies and there is no showing of contacts in this line of questioning between the witness and the other dairies so that he would be qualified to speak as to their philosophies.

Judge Hinkes: I think I must sustain the objection. I think we understand what the practice was from the witness' experience and that is about all we can go into.

Testimony of Frank T. Cannon

By Mr. McInerney:

Q. With respect to this attitude of Bowman of price private label the same as its own brand label and specifically with respect to your offer to that effect to A&P, was there some advantage to Bowman to having A&P accept the Bowman label at the same price instead of the private label? Do you understand my question? A. Yes, sir.

I think there was an advantage not only to the Bowman Dairy Company, but to the A&P Company also in having them priced at the same label. The advantage to us was that we had [6140] a highly advertised brand name and if you have ever worked in marketing or merchandising work, the name of the Bowman Dairy Company was well known from as far away as European companies that came to visit us because of our system, our merchandising and marketing ideas.

We thought we could do a better job with the Bowman label in marketing and merchandising for the Tea Company. The change for the Tea Company in getting a private label is they can make a change quicker and rapidly from one supplier to the other because they have now impregnated the market with a new name and built it up. But they would have had to spend considerable merchandising and advertising money to build up that label they were going to use, whatever the name was going to be.

Q. The replaceability advantage that you spoke of, if my question is clear, if not I will rephrase it, was that an advantage to A&P, that is, that they could replace their supplier more readily once they had their private label in their store? On the other side of the coin, would that be a disadvantage to Bowman? A. Absolutely, yes, it would.

Q. In your talks with Mr. Schmidt did you try to persuade him to take to the Bowman label rather than the private label? A. I did, yes, very strongly.

Testimony of Frank T. Cannon

Q. You were telling us of your discussion with Mr. Schmidt subsequent to the submission of this offer which has been marked [6141] A&P Exhibit 50, you said the private label being offered at a same price as your brand label was one of the subjects discussed. What other subjects were discussed at that meeting? A. He asked me to point out where our profit came from in the quotation, the quotation was broken down in columns with all different headings, our profit was in the second column, I believe, on page G in what we call markup.

Q. I am placing before the witness A&P Exhibit 50-G and asking him if that is the page to which he referred in his previous answer. A. That is correct. That is the page I referred to.

Q. The second column on that page is entitled "Markup"? A. That is correct, yes, sir.

Q. What did you tell Mr. Schmidt about what that markup included? A. That included a markup of approximately 6 percent gross for the Bowman Dairy Company. This is the thing that he wanted cleared up for his superiors who had asked him the question, as I understood it.

Q. Was that in accordance with his previous conversation with you that he wanted to make sure Bowman was making a profit? A. That's right, yes, sir.

Q. Now, what other subjects were discussed at this meeting between you and Mr. Schmidt? A. One of the points he made was did we take into consideration [6142] here any savings for pre-ordering of merchandise? A. We had not.

Q. What did you say on that subject? A. There was no pre-requirement that he had to pre-order.

Q. Was there any savings if he agreed to pre-order the merchandise? A. Yes, there was.

Q. Was that something you discussed with Mr. Schmidt? A. Yes.

Q. Did you tell him how much more he might save under such a situation? A. No, sir, I had nothing to tell him and he showed no interest in it. I might add most storekeepers don't take much interest in pre-ordering.

Q. Was anything else discussed on that occasion that you can now recall? A. Not on that visit, no, sir.

Q. Would you take a look at A&P Exhibit 50, which is now before you, and just glance over that and see if it refreshes your recollection in any way as to any other subject that came up?

Let me direct your attention to the second paragraph on page 1 which starts out "These quotations were developed by our accountants on an estimated total dollar volume of approximately $1 million." Was that a subject that was discussed by [6143] you and by Mr. Schmidt? A. Yes, to a small degree we discussed it as to how I arrived at it and it was something that was rather difficult to do; as I stated earlier we had been given no specifications or no dollar volumes to work with for the A&P Company, only a list of stores. We sent our merchandising staff out to each A&P store and counted the counter facings in the dairy case.

Q. Will you please explain what "counter facing" consists of? A. Facing is an individual carton and they normally will put six to eight half-gallons across, six to eight facings in the dairy case and maybe put alongside of it three to four casings of quarts. Our merchandising staff, we felt, was confident enough by the display in the dairy case they could estimate the volume of the store.

This is the way be arrived at the million dollar figure we used for volume per month.

Q. Your letter continues, approximately $1 million per month, 26 delivery-days, using Chicago list prices. Would you explain what Chicago list prices are? A. The list price is prices used in billing into the store at the store level.

Q. Is that the price that you were charging the cus-

tomer? A. In this case we were charging the store this price, but it would not be the price the A&P would pay for the merchandise.

[6144] Q. Would you explain thet difference please? A. Yes, they didn't want their cost prices in the hands of their store level people and between us we would agree to determine a given figure as to what we would charge the stores as a billing price, or a list price, call it either way.

Q. Now was that practice of billing the store at a price which was different than the net price that you would charge the customer, a standard practice in chain stores? A. Yes, sir, it was.

Q. Looking at Respondent A&P Exhibit 50-T, would you please tell us what that is? A. The sheet has two lists on it, two price lists. One is the chain store wholesale list, or what we bill the store on a given day for merchandise delivered. In other words, the manager of that store would assume that this was what it cost him that day for merchandise.

Q. And for internal bookkeeping purposes the store would be charged that amount, is that correct? A. That is correct, yes, sir.

Q. Was this sheet that is marked Respondent A&P Exhibit 50-T, is that a sheet that was in use at approximately the date it bears, August 23, 1965? A. That is correct, yes, sir.

Q. For some other customer of Bowman Dairy and not A&P, is that correct? [6145] A. Yes.

Q. What relationship would there be between the list prices to which you refer, Chicago list prices to which you referred in your letter and the price actually charged the chain? In other words, the net price. Could you give us some idea? A. Well, the "in-store" price is probably 50 percent less than—or more than, I should say, 50 percent more than the actual cost or the price billed to the Tea Company office.

Q. When you say the "Tea Company"? A. The A&P Tea Company.

Q. Is that the practice used with other chains as well? A. Yes, sir.

Q. Now referring to A&P Exhibit 50-N, which is entitled Net Delivered Prices, looking at that, can you tell us approximately the difference that there would have been between the so-called list price chain stores and the net price A&P would have been paying under your proposal, assuming you sold all the A&P stores? A. If we sold all the A&P stores and they had accepted our quotation as presented, using the first item, "quarts of homo-V.D.," their cost to them would have been .1696 per quart delivered their store. The difference between that and the—I am looking for the other exhibits.

Q. Does this Exhibit 50-N show the list price to chain stores? A. Yes, it does. If you will relate it to the 26.5 cents, [6146] this price to the chain store, you will see in that particular case it is even more than 50 percent mark-up.

Q. Going back to the portion of your letter that I have quoted referring to an estimation of approximately a million dollars a month, using Chicago list prices, just to carry out the calculation, if we were to assume that the total business involved here was, say, $10 million at the net prices, what would the Chicago list prices be? A. Chicago list prices then would bring the $10 million to approximately $15 million.

Q. Was a volume of approximately $1 million a month at list prices a precondition to the offer that you were making in your letter of August 31, 1965? A. No, sir, it was not.

Q. If A&P had given Bowman the business in all of its stores, even if that fell somewhat below the $1 million a month at Chicago list prices, would Bowman have de-

livered in accordance with this offer? A. Yes, sir, we would have.

Q. Was the use of the term "Chicago list prices" and what you meant by that? Was that a subject that you and Mr. Schmidt discussed at this meeting that you have just been describing? A. Not in any great detail, no, sir.

Q. You mentioned that there was some brief reference to it. Can you tell us what the reference was? [6147] A. Yes, the only reference was we used it to determine the million dollars a month figure that we estimated the Tea Company was then purchasing.

Q. Another exhibit in this case, which is Commission Exhibit 50-A, has a notation at the lower left-hand corner in Mr. Schmidt's handwriting, "Gross-retail." This copy is very difficult to read, but I don't think there is any question about that. This is "Gross-retail."

Does that refresh your recollection as to what you said to Mr. Schmidt with respect to Chicago list prices? A. Yes, I would guess that it meant this—

> Mr. Mathias: Your Honor, I will object to a guess unless Mr. Cannon can recall what the statement means. I think it has been established this was not his writing, but Mr. Schmidt's.

By Mr. McInerney:

Q. Will you tell us as best you recall?

> Mr. Mathias: If he knows, Your Honor.
>
> Judge Hinkes: Yes, we want factual information, Mr. Cannon. We don't want a guess.
>
> The Witness: Your Honor, I think I can bring it out clearly.
>
> It is a matter in reference to what the word "retail" means. Retail is the out-of-store price at the

level of the store, what they sell to Mrs. Consumer at.

[6148] If you will note, in most cases the retail pricing is very close to what the list wholesale pricing is. There is some deviations, there is no question about that. He would refer to anything out of store as retail pricing, where I would refer to it as list or wholesale price.

By Mr. McInerney:

Q. Those were roughly comparable, is that correct? A. That is correct. Some of our chain accounts, to further clarify it, they were identically the same, they would tell us what to charge the store and that same list price that we were told to charge the store was then used as the selling price to Mrs. Consumer.

Judge Hinkes: The store's profits came from the rebates or discounts, is that it?

The Witness: In this case it was direct net billing, there were no discounts.

Judge Hinkes: That is in the case of the bid you were making?

The Witness: That is correct.

Judge Hinkes: I mean for the stores.

The Witness: It would be discount, yes.

By Mr. McInerney:

Q. Can you tell us—

Mr. Mathias: If we are going to get to another page or another subject, could we have a five-minute break? We have [6149] been in session for some time. I believe we could all use a few minutes.

Judge Hinkes: Yes, we will take a short recess.

(Whereupon, a brief recess was taken.)

Judge Hinkes: You may continue, Mr. McInerney.

By Mr. McInerney:

Q. You have before you, Mr. Cannon, A&P Exhibit 50-N, a page to which you referred previously this morning, and I believe you told us that the net prices shown there were being offered to A&P in the event that you were to supply —that is, Bowman were to supply all of its stores, is that correct? A. That is correct, yes, sir.

Q. In the event that something less than all of the stores were to be supplied by Bowman, were there alternative pricings that Bowman was offering to A&P? A. Yes, sir, there were. There were two alternatives.

Q. What were they? A. One for 70 percent of the stores, which is on the same page, and one for 50 percent of the stores, that is on the same page.

Q. Now you told us previously that you consulted Mr. Hart and his law firm with respect to this offer. I am not sure whether we have it yet in the record. Did Mr. Hart approve your submission of this offer as being a legal offer? A. Yes, sir.

[6150] Mr. Mathias: I am going to object to a legal conclusion in here. I have no objection to his asking whether Mr. Hart approved the offer or not, but I think the term "legal offer" in here is a conclusion.

Judge Hinkes: I think the simplest conclusion is to ask him what Mr. Hart told him.

By Mr. McInerney:

Q. Tell us what Mr. Hart told you. A. The night before this presentation of the bid was made, Mr. Hart, Mr. ——

Mr. Mathias: Excuse me. I apologize for the interruption, but the problem with the question you have now asked is one ruled upon by Your Honor in connection with statements by one of our witnesses of a deceased associate and the problems of hearsay raised by the fact that the other party is now deceased. There is no way we can cross-examine Mr. Hart. He is now dead. I believe the testimony of Mr. Holin concerning his business associate was stricken on the ground it was not allowable under these circumstances.

Mr. McInerney: This is part of the submission of a very important bid to A&P and we are just asking for the recitation of what, in fact, occurred on the night before the bid occurred, I think it is part of the res gestae and I think it is highly material.

Judge Hinkes: I think I must allow this question, [6151] although I realize the difficulties of checking back where the person who made the statement has died. Nevertheless, I think under the circumstances, where the dispute apparently is between whether the attorney gave a legal opinion or just an opinion, the only solution to that controversy is to simply ask the witness what the attorney said and we will draw our own conclusion as to what kind of opinion was rendered.

Since that is the area of the dispute, I think this is simply the quickest and cleanest way of finding out what was said.

You may answer, Mr. Cannon.

The Witness: Mr. Parmalee, Mr. Hart and myself had dinner the night prior to my presenting this bid to the A&P Tea Company. I will have to assume it was on August 30 because I am sure this was presented on the 31st. We reviewed in detail the entire quotation.

Mr. Hart actually helped me write the letter that is on pages 1 and 2 of the quotation and it was with his approval and best wishes that I presented this bid to the Tea Company the following day.

By Mr. McInerney:

Q. I think you told us it was customary in submitting offers of this kind that you did review them with your attorneys ever since the time of the Government decree to which you referred? A. That is correct, yes, sir.

[6152] Q. And even in meeting competitive offers, you would not meet competitive offers without a written statement from the customer who got the competitive offerers witnessed by your salesman and submitted to Mr. Hart, is that correct? A. That is correct, yes, sir.

Q. In submitting this quotation, you were not meeting a competitive offer, were you? A. No, sir, we were not.

Q. Did Mr. Parmalee review the offer from the point of view of cost accounting? A. Yes, sir, he did.

Q. Did he also approve the offer? A. He did.

Q. Incidentally, were variations from published list prices or published discounts of dairies fairly common in the Chicago area at the time to which we are referring? A. Yes, sir, it was very common.

Q. Was it difficult or easy for you to find out what your competitors were offering customers such as A&P or other chain stores? A. In the major accounts it was very difficult.

Q. Was this regarded as a trade secret by members of the dairy industry? A. I believe so, yes.

Q. Would you have any way of knowing what other people were [6153] quoting to A&P for this business? A. No, sir, none at all.

Q. On what basis were the prices offered by Bowman in A&P Exhibit 50 for the milk products? On what basis

were they being offered in terms of the butterfat content of the milk? What was the butterfat content? A. They were offered on the basis of a 3.5 butterfat content.

Q. Is that reflected in your letter marked Defendants' Exhibit 50? A. I believe it is, yes.

Q. At the time that Bowman had been supplying A&P with milk prior to 1958, about which you have testified—

Mr. Mathias: Excuse me, I hate to interrupt, but could I have the last question and answer read back? There was a page reference that escaped me.

Judge Hinkes: Read the question and answer.

(The reporter read the question and answer.)

By Mr. McInerney:

Q. You have told us previously that prior to 1958 Bowman supplied A&P with milk and that sometime in that year Bowman was rather abruptly cut off by A&P, is that correct? A. That is correct, yes, sir.

Q. Did you have any long-term contract with A&P or were they free to cut you off? A. No, sir, we had no contract at all. They were free to cut [6154] us off.

Q. Is that typically true with respect to supplying chain stores? A. That is correct.

Mr. Mathias: I will ask that the witness be limited to his own knowledge.

Judge Hinkes: Yes, we are interested only in what you can supply from your own knowledge.

The Witness: I will not deviate from that. These are the facts as I know them. There were no long-term contracts in all the accounts I visited in the City of Chicago and tried to do business with.

Testimony of Frank T. Cannon

By Mr. McInerney:

Q. Now when you were supplying A&P, do you know what the butterfat content of the milk was? A. Yes, sir, I think it was—I firmly believe it was at 3.5 percent butterfat or higher. My reason for believing that that far back, which is a long time ago, is the great to-do we made in promoting our product on the street and talking about the high butterfat content of the product. The two Kullman brothers, the principal owners of the company, made us highlight that all the time, that we sold milk at much higher fat content than anybody else.

Q. Now, if A&P had asked you to supply a 3.4 percent butterfat content in supplying milk to them, would a cost saving have [6155] resulted in doing so? A. Yes, sir, it would have.

Q. Would Bowman have supplied it at 3.4? A. We would have supplied it at anything down to the limit of 3.35 percent for the State of Illinois.

Q. Can you give us some idea of why there is a saving involved in a reduced butterfat content? First of all, is it a difficult operation to reduce the butterfat content to the desired percentage? A. No, sir, it is not. It is a matter of the separation of the fat from the milk.

Q. Is there always, or is there usually some separation of fat from milk? A. It is done every day.

Q. And does it cost any more to reduce it down to 3.5 or 3.4 or 3.25? Is there any difference in cost? A. No, sir, there is none.

Q. What happens to the butterfat that results from that separation? Is that a valuable commodity? A. Yes, sir, it is. If you are in the manufacture of ice cream, you would use it in your own company, the butterfat, to use it for the manufacturing of mixes that would go into ice cream, or you can sell it on the open market to people who do make mixes and ice cream.

Testimony of Frank T. Cannon

Q. Does butterfat have a recognized market value on the open [6156] market as butterfat? A. Yes, sir, very definitely.

Q. In your dealings with Mr. Schmidt with respect to this proposal of Bowman's to supply A&P, were you able to tell whether Mr. Schmidt was very knowledgeable about the dairy industry and purchases of dairy products? A. No, sir, in my own humble opinion, I didn't think very highly of Mr. Schmidt's ability at all. Being a member of the trade associations in the area, there were many of us that felt the same way about it.

Q. In the event that A&P wanted some butterfat content which might be different from the butterfat content at which Bowman was supplying other customers and had accepted your suggestion that they take it in Bowman-labeled milk, would that have caused any insurmountable problem? A. No, sir.

Q. How would you reconcile any difference? A. Really, we would standardize down to the 3.5 fat for the filling purposes, for the product, and of course the cartons would just be run at a separate time from the others that might want a different fat content. We would have to separate them and that would be not a factor though. It would be nothing more than a separation of product in the cooler later on for cooling purposes.

Q. Was Bowman supplying other purchasers of milk with milk [6157] at butterfat content other than 3.5 at the time of this offer?

Mr. Mathias: Your Honor, I would like the witness to be instructed again that the question should be answered if it is within his own knowledge. I do not believe that the background of Mr. Cannon, as stated in his earlier testimony, has shown that he had anything to do with the processing end of the operations of Bowman Company.

Judge Hinkes: If this is within your own personal knowledge, you can answer the question.

The Witness: I can't answer that I know it, no, sir.

By Mr. McInerney:

Q. Now you were telling us about your meeting with Mr. Schmidt on the occasion of his calling you to explain certain facets of the offer that you had submitted to him, which has been marked A&P Exhibit 50. My question now, sir is, is there anything else that you recall about that conversation? A. Yes, there sure is. I came out of the meeting very elated. I might add ten feet tall, thinking I had secured the business. It was an impression left with me by Mr. Schmidt at that meeting. Not that he told me anything or said that I had it, but buyers have a way of indicating to you when you have done something good, or you are in a good position and even to this point I reported back to my superior, who was the president of our company, that he had promised me after I told him how I felt that I would be properly rewarded for my good work. It never [6158] turned out that way.

Q. How did you learn it didn't turn out that way? A. After a period of time, it could be two weeks, a little bit less or a little bit more, I didn't hear anything further from Elmer about it and I called him on the phone. I told him I was quite anxious and I went on to explain all the things we had to get into such as getting a supply of cases in because when you take on some 250 stores, whatever the exact figure is, you can multiply that by the number of cases you need and we have what we call a float factor of five to seven cases per store for tripage.

It would mean maybe some 30,000 or 40,000 or 50,000 cases we would have to order and get supplies. I went into some detail like this with them, kind of pushing me

to get the answer. I got the answer, just simply this, that he and his company had reviewed it, his superiors had reviewed our quotation and again the other quotations and there was such a little difference between the two that they had decided not to make any change.

Q. Did you have any further contact with Mr. Schmidt from that day to this? A. None that I can recall, no, sir.

Q. How long were you with the Bowman Dairy Company in all, approximately how many years? A. 32 and a half years.

Q. To the best of your knowledge and belief, what was the [6159] attitude of the Bowman Dairy Company at this time in 1965, the time that you submitted the bid to A&P with respect to compliance with the Robertson-Patman Act? A. I believe we were adhering to it as exactly as we could, from a layman's point of view.

Q. Was this a subject that you had conversations with Mr. Hart on, as you indicated previously on a number of occasions? A. I think it was daily with Mr. Hart or one of his attorneys in his office in his absence.

Q. Did you comply with their advice with respect to compliance with the Government decree? A. I had to under threat of discharge if I didn't, if I was found not complying with what the lawyers had told me I had to live with.

Q. Did you, in fact, comply with what the lawyers told you? A. I did, yes, sir.

Q. Was that also true on this particular occasion, your compliance with your lawyers' injunctions and advice? A. Yes, sir.

Q. Was this system of—excuse me, let me rephrase that.

If A&P had accepted this offer, was Bowman prepared to offer the very same prices to its other customers such as Kroger and High-Low? A. Yes, sir.

Mr. McInerney: We have no further questions.

Testimony of Frank T. Cannon

[6176] • • •

Q. Was there any reason why the obtaining of a new large amount of business was particularly significant to Bowman at that time? A. I don't think any more significant than to anybody else when they get a large piece of business. It would mean more employees and more work, and the like of that.

Q. You have mentioned that Bowman sold out eventually to Dean Milk Company. When did this sale occur, Mr. Cannon? A. The actual date of the signing was January 19, 1966.

Q. Were the negotiations in process at the time this contact was received from A&P? A. I wouldn't know that. I couldn't answer that. Looking back, I could assume, but I don't want to do that.

Q. During the course of your working on the proposal to A&P, did you become aware at any time prior to August 31 that there were negotiations underway with the Dean Milk Company to sell out? A. There were rumors.

Q. Did the president or any of your other superiors in the Bowman Company ever mention the possibility of a sale to Dean?

Mr. McInerney: Is this prior to—

[6177] The Witness: At what point, sir?

By Mr. Mathias:

Q. Prior to August 31, 1965? A. No, sir.

Q. You stated in your direct in 1965 you became general manager in charge of merchandising, marketing, advertising and, I believe, some other functions. Approximately when in 1965 did this promotion occur? A. I think it was in the month of January.

Q. And who had been your immediate predecessor? A. Mr. Albert A. Clarke.

Q. Who was in charge of the plant operations of the Bowman Dairy Company during this period July, August and September of 1965? A. In total, are you talking about?

Q. Yes, the regular day-to-day operations of the processing plants, yes. A. There were many plant managers.

Q. Was there one man in charge of each? A. Yes, there was a man in charge of each plant.

Q. Let's start with them. Who was in charge of each of the processing plants?

> Mr. McInerney: I believe this is also beyond the scope of the direct examination.
>
> The Witness: I would be pressed for names of persons [6178] on that level.

By Mr. Mathias:

Q. Was there anyone in charge of all your processing plant operations? A. Yes, Albert Geiss.

Q. Were you the only one from Bowman who had any direct contact with A&P personnel? A. At what time, sir?

Q. During this period of bidding in August and September 1965? A. During this period of the quotation, I am the only one that I am aware of.

Q. Mr. Cannon, you stated that when you were first contacted on the phone by Mr. Schmidt that you discussed this with your superiors and you used the words similar to the effect that you were concerned as to whether or not this might be a fishing activity to determine the market level.

What did you mean by this, sir? A. Well, I could only assume that the A&P had accepted a new increase in price from Borden and they were trying to find out at what level their pricing should be in the marketplace.

Q. Was this a common practice in chain accounts? A. It wasn't unusual, that's right.

> Mr. McInerney: I think it would be proper to move to strike the answer on the basis of the assumption, but I don't [6179] want to prolong this. I am sure when Your Honor is weighing the evidence the fact this was stated as an assumption rather than a fact will be quite clear.

By Mr. Mathias:

Q. You had had experience with this type of activity from chain accounts in the past, would that be correct, Mr. Cannon? A. Yes, I had.

Q. Now, Mr. Cannon, you stated that you and Mr. Parmalee and Mr. Hart worked up the quotation for A&P. I believe you said that this occurred over a two- or three-week period, is that accurate? A. That is approximate, yes.

Q. I believe you also stated that your merchandisers were sent out to the various A&P stores and made estimates of the sales volume to each of these stores, is that correct? A. That is correct.

Q. Approximately how much time was allotted or how much time did this take? A. That is a pretty difficult question. Our staff probably amounted to about 20 or 30 people. You can relate that to some 250 stores. I am using a guess for that figure of 250. It would take probably maybe an hour in some stores and knowing our people as well as I did, I daresay they went right in and knew the manager well enough to ask him, "What the hell are you selling?" And they would have been told.

[6180] We have people in the field for 25 and 30 years that knew everybody in their area.

Q. What I was getting at was the approximate length

of time it took to gather this information together? A. I would have no way of telling this.

Q. Would this have been a week or two? A. I am guessing at that, about two weeks, yes.

Q. Now, did A&P give you any information as to sales volumes of any individual stores? A. No, sir, only the statement I made this morning, they gave me a list of stores.

Q. Sir, I know in connection with A&P Exhibit 50 that the last couple of pages of this exhibit—that would be 50-U through 50-W—appear to reveal your sales experiences with A&P during the period 1946 through 1957 in the sales of various milk and milk line products; is that correct? A. That is correct, yes, sir.

Q. Were these sales figures used in any way to augment your estimates of the sales volumes involved here? A. No, sir, they were not. This is just a little bragging on our part, my part, I should say, to show them how much help we were to them in improving their sales over a period of time.

Q. So your estimate of the sales volume then was based strictly on the stores surveyed by your merchandisers? A. Yes, sir.

* * * * *

[6187] * * *

Q. Sir, is there any place on Respondent A&P Exhibit 50-B where it is stated that the homogenized milk to be sold to A&P under this quotation, if accepted, was 3.5 percent butterfat? A. No, but—

Mr. Mathias: I would like the witness to be asked to respond just yes or no to that.

Mr. McInerney: I object. I think he should be allowed to respond fully.

Judge Hinkes: I think the witness should be provided the opportunity to respond fully.

The Witness: As you stated, Mr. Mathias, it doesn't specifically spell out 3.5 butterfat, nor does it say there should be less than 3.5 percent butterfat.

Judge Hinkes: Was there anything in your bid that would prevent you from lowering the butterfat content from 3.5?

The Witness: We could have gone down, sir, anything to 3.25 according to law. It is my recollection and belief that we bid at 3.5.

Judge Hinkes: But is there anything in the contract, [6188] that is in the bid offer, that would have prevented you from going down?

The Witness: I don't quite know how to answer that for you. I am trying to follow the question.

Judge Hinkes: You have a quote, that is Exhibit 50. That quote has certain specifications. Were any of those specifications such as to prevent you from fulfilling the contract at 3.4 butterfat?

The Witness: No, we could have done it at 3.4. But remember, in my earlier testimony I said we received no specifications from the Tea Company other than a list of stores.

Judge Hinkes: Very well.

By Mr. Mathias:

Q. Is there any place in this offer on any page where it is stated in so many words that the homogenized milk to be supplied to the A&P Company under this quotation, if accepted, would be 3.5 percent butterfat?

Mr. McInerney: May I have the question read back?

Judge Hinkes: If you will, please.

(The pending question was read by the reporter.)

The Witness: I thought I had answered that before, Your Honor, but I will give the same answer again.

Although in my mind 3.5 butterfat on the top of page 2 refers to what—this refers to what we are going to use, and it doesn't say we are going above or below that 3.5.

[6189] *By Mr. Mathias:*

Q. It doesn't, however, state the milk will be 3.5 percent butterfat.

Mr. McInerney: I think the witness's testimony is quite clear.

Judge Hinkes: I am not sure I understand the last response of the witness. What were you referring to?

The Witness: The top of page 2 says, paragraph 1, "Chicago area prices are quoted on the basis of the present Order Number 30 price, plus a super pool which totals $4.32 per hundredweight for 3.5 percent Class I milk products."

It is my contention that I answered that by saying that this is my belief that I bid on 3.5 percent butterfat and at no place in here does it say I bid less than 3.5 percent butterfat.

By Mr. Mathias:

Q. We did cover in prior testimony this 3.5 percent figure is used in connection with Class I milk products, is it not, sir? A. Yes, that is right.

Q. And we have just gone through a number of products which varied in butterfat content from 5/10 of a percent up to over 32 percent, which were all Class I milk products; is that not correct, sir? A. That is correct.

• • • • •

[6197] Judge Hinkes: If he meant gross profit, that is one thing. If he meant net profit, that is another.

Mr. McInerney: Mr. Schmidt didn't talk of net or gross profit, he said overhead and profit.

Mr. Mathias: I don't see that the notation of Mr. Schmidt is correct. The figure included overhead and profit. This is the statement he made to Mr. Schmidt. I don't see anything to argue about.

Judge Hinkes: I wasn't sure the witness stated just exactly that. I wanted to be certain I knew what his answer was. For the sake of the record and for my information as well, I would like to have the witness tell me now once again what you are saying is correct, Mr. Cannon.

The Witness: At this point, I am quite confused but, to get back to the points, the statement I made in my direct examination this morning was a 6 percent mark-up and when we talk about mark-up, we talk about gross mark-up.

Now, if Mr. Schmidt made the statement, is overhead included in that, I may have said yes to it. He asterisked on there. I can't say I said yes, but the overhead would be in the 6 percent mark-up.

Mr. Mathias: The overhead would be in this 6 percent mark-up?

The Witness: Yes.

Mr. McInerney: Your Honor, may I ask a question?

[6198] Mr. Mathias: He can do that on redirect.

Judge Hinkes: Keep it in mind, Mr. McInerney.

By Mr. Mathias:

Q. Referring to the fourth column on Respondent's Exhibit 50-G, there is a reference to "direct vanning costs to sales area." What is meant by this term? A. That is

where it had to be transported from the bottling or processing plant to distribution points. It was averaged out in the cost.

Q. In the next to the last column, I see a heading "Commission". What is the meaning of this column? A. That is the wages that the route deliverymen earn, their commissions.

Q. Your route deliverymen were paid on a commission basis? A. That is correct.

Q. So they were paid so much of a percentage based upon the volume delivered; is that it? A. On a graduated scale, yes.

Q. Sir, referring back to the first column, the "Direct cost f.o.b. Chicago area plant," I believe you stated that Mr. Parmalee, with your assistance, computed the cost figures in this offer; is that correct? A. That is right.

Q. Now, sir, was the cost figures which are included in this column on A&P Exhibit 50-G based upon the anticipated volume [6199] of the A&P business?

Mr. McInerney: As Mr. Mathias pointed out before, if he knows.

Judge Hinkes: Yes, if he knows.

The Witness: I can't answer that, I really can't answer that correctly.

By Mr. Mathias:

Q. In connection with Respondent A&P Exhibit 50-H, which I believe you have previously described as the basis of the first column on 50-G, the first column on this page, 50-H, refers to the "Raw merchandise cost f.o.b. Chicago Plan." I take it that should be "Plants." A. I assume so, sir.

Q. Down below I see Class I price, $4.32 per hundredweight, which is that cited on 50-B as being the federal order price plus a super pool.

Testimony of Frank T. Cannon

Now, sir, do you know whether or not there were any other raw milk costs to the plant other than this basic federal order price and super pool? A. Yes, there were.

Q. Were all of the various elements of raw milk cost included in this column entitled "Raw merchandise cost f.o.b. Chicago plants." A. Yes.

* * * * *

[6209] * * *

Q. In connection with those prices under "50 percent of the stores," sir, that would be the last column. Were these prices developed on the basis of the costs calculated in connection with the estimated volume of 50 percent of the stores? A. Yes, the volume going through the plant, correct.

Q. And in connection with 70 percent of the stores, did you and Mr. Parmalee calculate these prices out on the basis of the volume that you would realize in your plant from 70 percent of the stores? A. Yes.

Q. Now, sir, in response to questioning by Mr. McInerney on direct, you had stated that you would have made this offer to other of your customers such as Kroeger and High-Low. At the time the offer was made to A&P, was it made to any other customers? A. No, sir.

Q. Was this considered? Did you consider making the offer at the same time you made it to A&P? A. We discussed it, yes, but we decided we did not have the right to offer it then because we wouldn't have the volume in the plants to bring the cost down.

[6210] Q. You were dependent on this additional volume in order to offer the prices included in your quotation? A. That is correct, yes.

Q. Why was this new volume so important to this offer? A. I don't think it was that important.

I don't follow the question, Mr. Mathias.

Q. Why was it important to obtain additional volume in your plant before you could offer these prices to the com-

petitors of A&P? A. You are prorating the cost of your total operation, all equipment, all machinery, the buildings, everything over more units, that brings your fixed burden down.

Q. If A&P had accepted this offer, would you have made the same identical offer to other accounts? A. Like size accounts.

Q. In other words, Kroeger and High-Low? A. Yes.

Q. Would you have made the offer available to independent stores or chains of a few stores? A. No, sir, we didn't have them to offer it.

Q. I don't understand that. A. We didn't have the others to offer it to. Those were the only two chains we had left at that time, Kroeger and High-Low.

Q. You did serve other stores? A. That is right, independent stores.

[6211] Q. Would you have offered it to any of the independent stores? A. No, sir.

Q. In your dealings with Mr. Schmidt, did he ever ask you if this offer was available to A&P's competitors? A. Yes.

Q. Did he ask you if you were then charging any of the A&P competitors on the basis of this pricing system? A. Would you do that over for me? I am not sure I understand it.

Q. Did Mr. Schmidt ask you if at that time, the time of the offer, you had made this pricing offer available to any of A&P's competitors?

Q. Yes. A. I don't recall that, no, sir.

Q. Now, sir, I note that in connection with the Illinois market area that your quotation offered to serve the A&P stores on a six-day delivery basis; is that correct, sir? A. That is correct.

Q. Was there any reason why this was so? A. Yes.

Q. What was that? A. Union requirements.

Q. What union—I take it this is your drivers union? A. That is correct, sir.

Testimony of Frank T. Cannon

Q. What drivers union did your routemen belong to in Chicago?

[6212] Mr. McInerney: I think this is well beyond the scope of direct, Your Honor.

Judge Hinkes: I think it is necessarily connected to the previous answer of the witness. I don't think we need to go any further than that, but counsel is entitled to an answer to his question.

The Witness: Teamsters Local 753.

By Mr. Mathias:

Q. In the Indiana area, I believe you mentioned you paid your drivers a commission there and that this was a matter of union contract. Do you recall what union was involved in the Gary, Indiana area? A. I can only recall that it was a Teamster local, I don't recall the number.

Q. Would number 835 refresh your memory? A. That could be it.

Q. But your routemen there were members of the local Teamsters union? A. They were, yes.

Q. In connection with the areas where you offer three-day delivery, is it possible that some of the A&P stores would not be equipped to take three-day delivery?

Mr. McInerney: I object, Your Honor.

Judge Hinkes: I don't think we want to talk about possibilities, do we, Mr. Mathias?

[6213] Mr. Mathias: The reason I am getting into this at least in one of the zones involved in this matter, insofar as the Borden offer was concerned, three-day delivery was made available to the stores and yet a few of the stores chose to take a greater number of days' delivery.

Mr. McInerney: I still don't see that the question is at all competent.

Mr. Mathias: I am asking does he know if some of these stores—

Judge Hinkes: That was not your question.

By Mr. Mathias:

Q. Do you know whether some of the stores in the Indiana area were not equipped for three-day delivery? A. I do not know.

Q. Sir, do you know whether or not the union requirements in Lake and Porter Counties could permit three-day delivery at this period of time? A. I do know that, yes.

Q. Is it your opinion that it would? A. They did permit less than six days a week.

Q. Sir, between the time that you had completed your dealings with Mr. Schmidt and the time you were first contacted by A&P counsel, I believe that it has been previously noted on this record that you hadn't done a great deal of thinking about these negotiations? [6214] A. That is correct.

Q. Would it be correct to say that your recollection is hazy as to many portions of the dealings and surroundings of these various negotiations?

Mr. McInerney: I object to that.

Judge Hinkes: I think I must sustain the objection. I think that an overall question such as that is meaningless. I think the inquiry should be made with specific questions when you have them and not a summary. Obviously, some events may be very clear in this witness's mind.

Unless you wish to ask the witness whether all of it is hazy, that would be permissible, but to say that "most," then we won't know anything.

Testimony of Frank T. Cannon

By Mr. Mathias:

Q. Were all of your recollections hazy as to most of these events? A. No, sir.

Q. You are quite certain that union regulations allowed three-day delivery at this time? A. Yes.

Q. Do you recall the name of the Bowman employee who was the branch manager in Gary, Indiana at this period of time, sir? A. I believe it w . John Kalchbrenner. The reason I am slightly hazy there is there was a retirement just about that time when a Mr. Al Selmer left.

[6215] Q. At the time of this quotation, did you have any discussions with any union representative in the Indiana area? A. No, sir, none that I can recall.

Q. Now, sir, referring again to your A&P Exhibit 50-H—excuse me, G and H. Strike the question.

Mr. Mannon, it has been established in your previous questioning that Bowman subsequently sold out its operations to Dean in January of 1966; is that correct, sir? A. That is correct, yes.

Q. And Bowman at that time ceased to exist in the Chicago market? A. That is correct, yes.

Q. In your opinion, would there have been any change in this decision to sell out had Bowman obtained the A&P business volume involved here?

Mr. McInerney: I object to that, I think it calls for speculation and no groundwork has been laid for it.

Mr. Mathias: The man was general manager of their operations at this point. I believe he is qualified to state an opinion.

Mr. McInerney: He already said he knew nothing of the negotiations that lead up to that.

Mr. Mathias: Prior to August 31, he stated that. He has not said he knew nothing of the negotiations after that.

Testimony of Frank T. Cannon

Judge Hinkes: I am going to allow him to answer the [6216] question. The gentleman was a member of the company and had an assumed familiarity of the processes that must have gone on.

You may answer.

Mr. McInerney: Would you like the question read back?

The Witness: Yes, and I will only give you a factual answer, not an assumption.

Judge Hinkes: Do you recall the question?

The Witness: No, I would like it repeated.

Judge Hinkes: Would you read the question?

(The pending question was read by the reporter.)

The Witness: I had no factual information regarding that at all.

Judge Hinkes: Where was the decision made to sell, at what point of position within Bowman?

The Witness: I would not know that answer. I was only an associate director. That was decided by the directors themselves.

Judge Hinkes: You did not participate in that?

The Witness: No.

By Mr. Mathias:

Q. Was there any discussion at any meetings you attended? A. Yes, there were.

Q. What was the earliest date of such a discussion in which you took part? [6217] A. Sometime in November or December of 1965 they finally brought the rest of us into it to start telling the story and that story wasn't told to us. It was told to us that they were considering production mergers. This is how this whole thing got started and apparently they had been talking about it for some time.

Q. It was indicated they were talking about it for some time? A. That is an assumption, I really don't know that for a fact.

Testimony of Frank T. Cannon

Mr. Mathias: If I may have a few minutes' break, I don't believe I have a great deal more cross, but I would like to go through my notes.

Judge Hinkes: Very well.

Mr. Mathias: We would like to have about five minutes.

Judge Hinkes: Very well, we will be in recess for another five minutes.

(A brief recess was taken.)

Judge Hinkes: Back on the record. Mr. Mathias?

By Mr. Mathias:

Q. Mr. Cannon, you told us in response to an earlier question that Mr. Schmidt did ask you in this offer would be made available to A&P's competitors. Did you inform him, as you have us, that this would be made available to your other chain store customers? [6218] A. I informed him it would be made available to them, but I would never tell him it would be the same price. We never gave that information out, to be honest with you.

Q. Since you have moved to Canton, Mr. Cannon, have you had any business association with A&P in that market area? A. Very little. I called on them at the Cleveland office a number of times, but I have done no business with them directly myself. I have not secured the business in any way. The little bit we had was there before I came to Canton.

Q. You have been soliciting business? A. Yes.

Mr. Mathias: No further cross, Your Honor.

Judge Hinkes: Mr. McInerney?

Redirect Examination by Mr. McInerney:

Q. Mr. Cannon, you told us in submitting this bit, A&P Exhibit 50, you were offering A&P milk with a 3.5 percent

butterfat content at those prices and that if the butterfat content would be reduced, that you would reduce the price to A&P in accordance with the value of the butterfat?

> Mr. Mathias: I will object to this form of questioning. This is Mr. McInerney testifying. It is Mr. McInerney's witness. I believe this is highly irregular. It is a summation. I don't recall any testimony exactly of the nature of that stated by Mr. McInerney and I believe it is highly unfair for [6219] him to characterize the testimony and try to summarize it in such a way to his own witness.
>
> Judge Hinkes: I believe you should avoid that, Mr. McInerney.
>
> Mr. McInerney: I was trying to save time, Your Honor.
>
> Judge Hinkes: I don't question your good faith, but you could be wrong and prejudice the record.

By Mr. McInerney:

Q. In offering this bid, were you offering A&P the price stated therein at 3.5 percent butterfat content? A. Yes.

Q. If that butterfat had been reduced, would you have given A&P lower prices in accordance with the butterfat taken out? A. Yes, we would have.

Q. In response to a question from His Honor, you said that you would be legally free to reduce the butterfat content down to as low as 3.25 percent, do you recall that? A. That is correct, I do.

Q. If you had done that, would you have given A&P the benefit of whatever reduction resulted in your cost? A. Yes, we would have.

Q. Now, if Bowman had in fact reduced the butterfat content of the milk being supplied to A&P lower than 3.5

and didn't tell A&P about that and instead kept the resulting cost saving for [6220] itself, would you consider that honest? A. No, sir.

Mr. Mathias: I am going to object to that question strenuously; first of all as being hypothetical, secondly as being quite leading, third as being totally irrelevant in any event.

Judge Hinkes: I will sustain the objection. What the witness may have thought is not relevant to this proceeding. Perhaps what he would have done was another story but what he might have thought we shouldn't get into.

By Mr. McInerney:

Q. Would that have been consistent with what you were offering to A&P in Exhibit 50?

Mr. Mathias: I will object again that the question is tainted and improper to this witness.

Mr. McInerney: I object to the adjectives "tainted" and "improper."

I think the question is relevant to get the witness's opinion as to whether the butterfat content was consistent with the offer he was making.

Judge Hinkes: I will allow it.

The Witness: We would not have reduced the butterfat content without talking to A&P about it and discussing the facts with them.

Q. If you had reduced the butterfat content without talking to [6221] A&P, would that have been consistent with the offer you were making in Exhibit 50?

Mr. Mathias: I object. It is highly speculative and irrelevant.

Judge Hinkes: It is speculative, but I will allow him to answer it.

Mr. McInerney: Would you like the question read back?

The Witness: Yes.

Judge Hinkes: The question was whether it would be consistent with Bowman's policy.

(The pending question was read by the Reporter.)

The Witness: No, it would not have been consistent.

By Mr. McInerney:

Q. You told us Mr. Schmidt said from the outset he wanted Bowman to quote prices which would result in a profit. Do you recall that? A. I do, yes.

Q. Did he tell you why A&P would care whether or not Bowman made a profit? A. I don't recall that we really discussed it in that kind of detail.

Q. Do you have any idea as a result of your previous deals with A&P as well as others why A&P would care whether or not Bowman made a profit?

[6222] Mr. Mathias: I object, Your Honor.

Judge Hinkes: I will sustain the objection. That is going a little too far.

By Mr. McInerney:

Q. Has anyone from A&P ever communicated to you the interest of the company in having its suppliers make a profit? A. Yes.

Q. Who was that and would you tell us generally what was said? A. Yes, I can go back to many buyers that discussed it, Mr. Harshbarger was one, before him, Mr. Brick Carter.

Q. What was their position with respect to that?

Mr. Mathias: I will object to this line of questioning as not being proper redirect. There was nothing of this gone into on cross.

Mr. McInerney: There was something on profit as I recall it.

Mr. Mathias: We straightened out one figure and that hardly goes into this line.

Judge Hinkes: That is correct. This is along the same line you questioned your witness on direct examination, Mr. McInerney. I don't think it is proper redirect.

By Mr. McInerney:

Q. In your discussions with Mr. Schmidt about the mark-up that Bowman was adding in this Exhibit 50 to which we have been referring, you told him that that would include a profit, as I [6223] recall; is that correct? A. I did, yes.

Q. Mr. Mathias showed you Commission Exhibit 50, which has the same page as A&P Exhibit 50. In Commission Exhibit 50, the page is I and in A&P exhibit, the page is G. He called your attention to a notation made by Mr. Schmidt with an asterisk to the mark-up column and then the asterisk, the footnote reads "Overhead and profit approximately 6 percent."

Is that notation in any way inconsistent with what you told Mr. Schmidt with respect to your profit? A. I don't believe it is.

Q. Mr. Mathias asked you if Mr. Schmidt had asked you if this offer, Exhibit 50, would be made available to competitors and you said that he had. He much later asked what you said about that and you said that it would be, you told Mr. Schmidt it would be, but that you didn't specify the price, as I recall your testimony? A. That is correct, sir, yes.

Testimony of Frank T. Cannon

Q. In fact, however, had you not previously decided within the Bowman organization that if A&P had accepted this offer that it would have been made available on the same terms to Kroeger and High-Low? A. We had decided that, yes.

* * * * *

[6227] and the competitive offer and that the other offer was being accepted, did you offer to reduce the butterfat content in your milk and give a lower price? A. No, sir, we were not given any further opportunity to make any more bids or any more offers to the Tea Company.

Q. Did you make any protest to Mr. Schmidt that you could shave your butterfat content and give him a better price? A. No, I did not. I was not aware that was a bone of contention at the time.

Q. Mr. Cannon, why did you offer 3.5 percent milk to A&P? A. Going back into the history of when we served them before, Mr. Mathias, we used the same policy that we had served them before, because we had been given no specifications by the Tea Company.

Judge Hinkes: Is there anything else, Mr. Mathias?

Mr. Mathias: One moment, sir, there may be. No further questions, Your Honor.

Mr. McInerney: No further questions.

Judge Hinkes: You may step down, Mr. Cannon.

(Witness excused.)

* * * * *

Testimony of Robert Abrahms
March 20, 1974

* * *

[6385] * * *

Q. I show you a document marked Respondent A&P Exhibit 63, for identification, and ask you if you can identify that document for us, sir? A. Also, with the variance at the bottom, it would have been for Westchester and Upstate New York-Albany area.

Q. I show you RAPX 64, for identification, and ask you if you can identify that area for us? A. That would have been for delivery to Boston.

Q. Would these have been proposals that were made to Hershel Smith? A. Yes, they were.

Q. I notice Respondent's A&P Exhibit 62, is dated May 1964. Would that proposal have been submitted to him at or about that time? A. Yes, it would.

Q. Respondent A&P Exhibit 63 is dated May 1964. Would that proposal have been submitted to Hershel Smith at or about that time? A. Yes, it would.

Q. Finally, Respondent A&P Exhibit 64, entitled Milk Formula 1965 (April), would it have been submitted to Hershel Smith at or about April of 1965? A. Yes, it would.

[6386] Q. Did you discuss each of these proposals with Hershel Smith at or about the time they were given to him? A. Yes, I did.

Q. And did these proposals provide for delivery to the A&P stores in the area that you have mentioned?

Mr. Mathias: Your Honor, before we question the witness about documents that have not been offered in evidence, are these documents to be offered in evidence?

Mr. Curnin: To simplify it, we offer them, now.

Mr. Mathias: Before they are received in evidence, Complaint Counsel would like some voir dire.

Judge Hinkes: Very well.

Voir Dire Examination by Mr. Mathias:

Q. Mr. Abrahms, referring particularly to RAPX Exhibit 63, I note that there is some writing at the bottom of that page. The last printed matter ends with a line "Total Platform price". There is some handwriting that appears there. Is that your handwriting, Mr. Abrahms? A. No.

Q. Do you know whose it is? A. It would be my fathers.

* * * * *

[6397] * * *

By Mr. Curnin:

Q. Now, did you discuss with Mr. Smith the price advantage the price benefit that he would receive with that type of delivery service? A. Yes, we did.

Q. Would you tell us what that conversation was? A. We had a missionary sales job to do here because this was just at the changeover from full service, which was the accepted rule, to a limited service, which is today the accepted rule, and A&P had full service in all of the areas in which we were contemplating delivery and the store personnel and the supervisory personnel felt they needed the full service and we had to try to convince Mr. Smith that it was not necessary and the savings that he would accrue by having limited service would more than offset the new problems at store level by not having it, and it was to A&P's benefit to save the money and to go into this sort of an arrangement.

Q. During your discussions with Mr. Smith in connection with the proposals that have been marked Respondent A&P Exhibits 62, 63 and 64, did you discuss with him any particular pricing formula that you used in establishing your price to A&P? [6398] A. We had always bought

milk before on just so much a quart—you know, 20 cents, 22 cents, whatever the price was. Our proposal to him had to move based on the Government announced price for milk, and as a result we set up a formula we would charge him so much a quart over the Government announced price for milk, because we could not, on the pricing we were quoting, we could not afford to absorb any future increases.

Q. What was that amount above the raw milk costs that you discussed with Mr. Smith? A. Approximately 6 cents a quart above the raw milk cost is what we had suggested the milk should cost delivered to the store.

Q. Did you break down for him your costs within that 6 cents a quart? A. Yes. I think the price sheets are fairly well detailed as to a real breakdown as to those costs.

Q. Would you tell us the pricing formula that you did discuss with Mr. Smith and how much you would add for your costs? A. Well, we had discussions with Mr. Smith, even subsequent to this period, verbal discussions, but basically, what I believe we had proposed originally, which has now since been slightly modified, is what, at that time, my father called the 2-2-2 formula.

[6399] Q. Would you tell us your conversation with Mr. Smith about the 2-2-2 formula? A. Again, that 2-2-2 formula is basically just a reference area from which to work. It was not a refined breakdown. Those formulas are more refined breakdown, but basically, what it was, was that the carton, at that time, in New York City, was, basically, a Canco Cargon, which cost 2 cents, and that the delivery was usually estimated—we also estimated it at approximately 2 cents, and we figured the plant costs and plant profit at approximately 2 cents, and that is how we arrived at the 6 cent figure.

Q. That was part of your discussion with Hershel Smith? A. Yes, it was.

Judge Hinkes: When you speak of delivery, what delivery are you referring to?

The Witness: The delivery from the plant into the store. In some cases it had to go through a depot and in some cases it could go directly, depending on the distance from the store to the plant.

Judge Hinkes: Was this the formula for the private label?

The Witness: It was basically our formula for the private label.

Judge Hinkes: I thought you said you couldn't make [6400] delivery—someone else had to do that?

The Witness: That is correct. We made arrangements with truckers charging approximately a penny and a half to 2 cents, depending on the volume.

Judge Hinkes: Charging whom?

The Witness: The store.

Judge Hinkes: Why do you add 2 cents on for delivery if the store is going to be paying that?

The Witness: The store was always interested in knowing what his total price would be and we had to provide him with the name of a trucker who would be willing to deliver at approximately that price.

Judge Hinkes: Actually, your price would be 2 cents less than the price quoted, and he would have to pay delivery. Isn't that right?

The Witness: He would pay the trucker 2 cents.

Judge Hinkes: It may be 2 cents. It would be maybe less or more?

The Witness: We based it on what the truckers were currently charging our other customers.

Judge Hinkes: But that was no assurance. Is that correct?

The Witness: It was no assurance other than basic business practice, what we know the current business [6401] practice was.

Judge Hinkes: I don't quite understand—if you are going to charge 6 cents over the raw milk cost, and that includes 2 cents that you were not paying, but you expected the customer to pay, then your price is really not 6 cents over the milk cost, only 4 cents over the raw milk cost, and the customer will assume whatever risk he has to assume to get delivery?

The Witness: That is correct except, can I add one thing?

Judge Hinkes: Yes.

The Witness: Before we made any proposal to any additional chain or any additional store, we had always checked with the existing trucking companies in the area to see if any were interested in delivering to that store at approximately that price, or we would have been foolish approaching a store if we were not in a position to have the milk delivered.

Judge Hinkes: I don't question your good faith in giving him an idea what they were going to have to pay—all I am saying is you weren't really charging 6 cents over your raw milk price?

The Witness: That is correct.

By Mr. Curnin:

Q. As I understand it here, Mr. Abrahms, and I think it [6402] has been clear all along—what you were doing, in your discussions, you were quoting a total price, because that is what the store wanted to know, what it would cost them to get the milk into their stores? A. That is correct.

Q. And included within that cost was so much for processing and profit and containers, which would be your cost, and so much for delivery, which was based upon existing practice, and your own inquiry of truckers as to their availability to deliver the product? A. That is correct.

Testimony of Robert Abrahms

Q. Did you have any discussions with Mr. Smith concerning the question of whether or not this pricing formula, which you have described for us, could be used in markets outside of New York?

Mr. Mathias: Your Honor, I am going to object to the expertise of this witness as to where this formula could be applied.

Mr. Curnin: That is an improper objection, Your Honor, as to this question.

Judge Hinkes: I think I must allow it—simply—whether or not he has any expertise—he is being asked whether he had any discussions, and I am not necessarily being asked to accept his expert opinion on the subject. I think the question may be answered.

[6403] Mr. Curnin: Repeat the question for the witness please.

(The pending question was read by the reporter).

The Witness: We did have lengthy discussions as to the application of this basic formula to other areas, and we told him that he had to be very careful in arriving at the Government raw milk price because, in some cases there were not Federal Orders with which to work off, where the price was very clearly posted, and in some order the price was quoted f.o.b. the city, and some orders it was quoted f.o.b. 200, like in New York, it is quoted f.o.b. 200 miles from the city, so he had to first establish very clearly what the raw milk cost was. because in all cases it was not as easy to determine as it was in New York.

Secondly, we told him as far as we knew, the Canco prices were similar all over, because we had some dealings with Canco in some other areas and we were aware their pricing was basically the same

all over because their price sheets said it was applicable in all of the states east of the Continental Divide, and as far as the processing and delivery, we told him naturally it would have to be adjusted for the differences between our labor rates and the labor rates in the area in which he was quoting and we gave him, I believe, at that time, even detailed figures as to what we figured the labor portion of each of [6404] these segments was and we said, with an Accountant looking at the figures, he could then adjust them for whatever area of the country he then wanted to apply them to.

Mr. Curnin: When you say he could adjust it, you mean with the adjustments you pointed out he could apply his pricing formula in other areas?

We thought so, yes.

Judge Hinkes: What about delivery?

The Witness: We told him what portion of the delivery was the labor part of it and what was the truck part of it and he would have to adjust, based on what we told him, at that time was our labor cost in the delivery, and he would have to adjust it based on the labor rate, whatever other area he went into.

Judge Hinkes: Is this any kind of formula, really. All you are saying is the seller is going to have to calculate his costs and arrive at a price. What formula is involved here?

The Witness: The formula that was involved was, prior to this time milk was never quoted so much over the Government price. Today, it is the established method of buying milk.

Judge Hinkes: That, I can understand. What you are saying is a seller will have to make a bid on costs over raw milk?

[6405] The Witness: At that time, whenever you went into a chain, they asked you what your price was. Many times it didn't change with the Government price because a lot of the dairies estimated what the price was going to be for the year and gave them that price.

Judge Hinkes: I understand your testimony. Apparently, what you are saying is that 6 cents is not necessarily the formula that everyone can use?

The Witness: It is a basis for starting to figure out plus and minus.

Judge Hinkes: Very well.

The Witness: That is correct. It was a basis. At that time, the chains had no idea whether it was 6 cents, 12 cents, 14 cents. It was never even discussed. Most of them didn't even know what the raw milk was costing.

Judge Hinkes: Aside from raw milk, I am speaking now of the override of 6 cents that you used?

The Witness: That is correct.

Judge Hinkes: That 6 cents is not necessarily applicable to any other dairy—necessarily, I say?

The Witness: Most of it—a lot of it is, yes.

Judge Hinkes: When you say a lot of it is, what do you mean?

The Witness: The carton cost certainly is.

Judge Hinkes: 2 cents is?

[6406] The Witness: Yes.

Judge Hinkes: What about the rest?

The Witness: Most of the large companies, the cost of processing, the delivery, within reason, has to be similar for competitive reasons. There is no secret today what everyone's costs are, basically.

Judge Hinkes: All I am saying is your 2 cents, for example, for delivery, is not necessarily applicable

to Chicago where the distances may be entirely different, where the terrain may be entirely different, where labor rates may be entirely different?

The Witness: We suggested to Mr. Smith he had to take into consideration the labor rate, the difference in the labor rate.

Judge Hinkes: Okay. All I am saying is the 2 cents used is not necessarily applicable to any other dairy, except you, where you have experienced it. Is that correct?

Mr. Curnin: I would object to the question.

Judge Hinkes: For what reason?

Mr. Curnin: I think the witness's testimony here, Your Honor, which has been gone into at some length by Complaint Counsel, myself, and Your Honor, is quite clear.

Judge Hinkes: Unfortunately it isn't clear to me and that is very important.

[6407] Mr. Curnin: I certainly want the record to be crystal clear, Your Honor, but as I listen to the questioning, we seem to be getting away from what was the substantive discussion between the witness and Hershel Smith, what this witness's views were on the subject, and what those views were as communicated to Hershel Smith.

Judge Hinkes: Let me make myself clear. The witness has testified that he discussed with Mr. Smith the use of a formula and the formula that was advanced was a certain cents per quart over raw milk costs. The cents used by this particular dairy, in talking to Mr. Smith, was 6. Divided up 2 cents for cartons, 2 cents for delivery, and 2 cents for plant costs and profit, and now, as I understand the testimony of the witness, he also told Mr. Smith that that formula was also useable elsewhere, and that is

where we get down to the nitty-gritty. I want to know if that formula was really contemplated for Chicago, and that is what we are interested in, not really New York.

Now, apparently, it was contemplated, and I want to know exactly what was contemplated. Was the figure 6 cents contemplated or was merely a cost or a price overriding the raw milk contemplated, and that price or cost to be calculated by the dairy involved recognizing differences in costs from one dairy to the next.

[6408] Mr. Curnin: Isn't the question here, Your Honor, what discussions and what information was exchanged between this witness and Hershel Smith?

Judge Hinkes: Exactly, and I say when he said to Mr. Smith—this formula can be used—what exactly was meant? Was it a formula of 6 cents per quart over raw milk costs or was it simply costs over raw milk to be determined by the dairy which may or may not be 6 cents?

Mr. Curnin: I think I heard the witness's testimony Your Honor, and I thought he went into some detail as to just what it was he told Hershel Smith was the way to use this formula, as a reasonable basis or bench mark for determining costs in other jurisdictions, but the record will certainly tell us as to the substance of that conversation.

Judge Hinkes: I am not satisfied the record is that complete, and that is the reason for my questioning this witness, and it is important to understand what the record is showing. You may have a very good impression of what the record shows, better than I do. I don't question that, but unless I am so satisfied, it is incumbent upon me to be sure the record does make that clear.

Mr. Curnin: I don't disagree with that but I am suggesting, and that is all it is just a suggestion, that the clarification, if it need be, should be in terms of what [6409] the conversation was between this witness and Mr. Smith.

Judge Hinkes: I agree with you. I want to be sure I know exactly what was said. That is what I am asking him—were you talking about any dairy can use 6 cents over raw milk when you spoke to Mr. Smith, or were you talking about any dairy could use its costs over raw milk which may or may not be 6 cents? That is my question and I think the witness ought to be able to answer that.

The Witness: What we told Mr. Smith is that any well run dairy should be able to work off the 6 cent formula adjusted to the local labor rates.

Judge Hinkes: Only labor?

The Witness: We thought, at that time, that labor was the only factor of any significance which really varied. Naturally, a tremendous variance, also covered with Mr. Smith, would have been the size of the drop at the A&P stores. We had told them how many units a store had to use, and so long as it was similar between areas, there was no problem.

Judge Hinkes: How about plant costs?

The Witness: The plant costs, basically, should be the same except for labor, depending on area of the country there is no great difference.

Judge Hinkes: You think their efficiency is the same?

[6410] The Witness: Of every particular plant?

Judge Hinkes: Yes.

The Witness: Absolutely not.

Judge Hinkes: Then, how can their plant costs be the same?

The Witness: I said in any area, the efficient plants all have similar costs.

Judge Hinkes: Regardless of the age of the equipment?

The Witness: No, I said the efficient plants.

Mr. Curnin: May I interrupt here, so the record will be clear. Is this an inquiry as to—that Your Honor is seeking to determine as to the reasonableness of the formula as this witness views it, as separate and distinct from conversations he had with Hershel Smith?

Judge Hinkes: Oh, no. I am still trying to get exactly what he told Mr. Smith, and to the extent that his answer appears to be—what shall I say—open to different constructions, I am exploring that to be sure I understand which one of these constructions was conveyed to Mr. Smith.

Mr. Curnin: That is where I have my problem. I don't think the record here is clear on that subject at all. The record seems to me to be very clear as to the discussion he had with Hershel Smith, and I believe Your [6411] Honor is asking questions as to what Your Honor feels may be concerning the reasonableness or soundness of the formula as applied or used or enunciated, but that is something, or may be something separate and distinct from conversations with Hershel Smith. That is the only point I make, Your Honor.

Judge Hinkes: Perhaps, I have covered this sufficiently. I don't want to belabor it any further. Perhaps we can go on then. You may continue.

Mr. Curnin: I am thinking, now, in terms of the questions that you asked, Your Honor, about this witness, and this particular pricing formula.

In regard to this pricing formula, Mr. Abrahms, 2-2-2 pricing fromula, call it what you will—did you or your father originate this pricing formula?

The Witness: I don't believe so.

Mr. Curnin: Well, was it something that was known—

Mr. Mathias: Your Honor, I believe now we are going beyond the discussion between Mr. Smith and Mr. Abrahms.

Mr. Curnin: I believe we have been beyond that for some time.

Mr. Mathias: And the proposed testimony here and I believe it is irrelevant.

[6412] Judge Hinkes: Mr. Curnin, you objected continuously to what you believed was my going beyond. I don't believe, now, it is quite proper for you to engage in that particular inquiry, having insisted I should not.

Mr. Curnin: I don't think any statement of mine, Your Honor, could be one that would be characterized as insistence that Your Honor not proceed. Obviously, Your Honor would not permit me to direct Your Honor's questioning.

Judge Hinkes: I think the language used was actually, you object, which is even worse. The point of the matter is, do we want to go into this beyond the discussions? I ask you that question, Mr. Curnin, having asked me that.

Mr. Curnin: The only point is, assuming Your Honor has had direct, I suppose I am entitled to a limited cross on the subject. It seems to me there is some question in Your Honor's mind about the formula and its application or possibly its creation, and as I was trying to simulate Your Honor's questions, and it is to this limited area I wish to address

a few questions to the witness. I think it might be helpful to Your Honor.

Mr. Mathias: Your Honor, I am going to have to object as being beyond the relevancy of the issues in this case, beyond the scope of the examination proposed for this witness. If we are going to get into philosophical discussions about the dairy industry with this witness, in [6413] Albany, New York, or other parts of the country, this examination can be practically endless. I don't see why it can be fruitful. A&P has prescribed itself in the examination of this witness by its stated purpose for calling the witness as:

"To testify to his discussions with A&P on private label milk and dairy products and the duration of arrangements for the supply of milk and dairy products", and I object to this line of questioning.

Judge Hinkes: I must sustain the objection. Did you discuss with Mr. Smith the origin of the 2-2-2 formula?

The Witness: Between my father and myself, we probably had 200 hours of discussions with Mr. Smith. They were very long, very laborious, and we were very interested at this time in selling A&P because it represented 200 times what our current volume was. There was a tremendous amount of time spent trying to educate Mr. Smith, in connecting into this sort of arrangement, and we did discuss with Mr. Smith, in detail, the different type of arrangements that some of the other national chains had at the time and the reason this 2-2-2, the reason that the split came about, is because another large competitor in the New York market was Safeway stores out of California, and Safeway at that time was about the only chain store in the country, I knew

[6414] of, that had their own milk plant. In the New York area, they had come to us, that they wanted to use our plant, but they wanted to supply their own milk, wanted to supply their own cartons—

Judge Hinkes: This, all, you talked to Mr. Smith about?

The Witness: That is right. We were trying to show him the type of other arrangements the chains were making.

Judge Hinkes: Remember, all I want to know now is what you talked to Mr. Smith about?

The Witness: Yes. This was discussed with Mr. Smith. We also discussed with him the Bohack arrangement in New York; the Bohack Safeway arrangement in New York was where they wanted to supply the milk, they wanted to supply the cartons, and they wanted to do their own delivery, and they only wanted us to do the pasteurizing and the processing. So we had to establish with Safeway a price for that function. The wind up of the Safeway situation was we did not get the business, that the business went to another New York dealer, and Safeway supplied the cartons and did their own delivery under their own name, and the dealer in New York supplied the milk and processed the milk.

Judge Hinkes: This, too, you told Mr. Smith?

The Witness: Yes. He was aware.

[6415] Judge Hinkes: No. Did you tell this to Mr. Smith?

The Witness: Yes. We had lengthy discussions with Mr. Smith about the Safeway situation.

Judge Hinkes: About Safeway's business going to someone else?

The Witness: That is right, and about Safeway's general conduct of their business because we were

trying to use them as an example of why A&P should go into private label because Safeway was in what we called a captive label. They had their own company—they called it Lucerne Milk Company, and the milk was sold under Lucerne brand. We were trying to use Safeway as an example where they were building their own plants and going into their own delivery. We were trying to say he should use us to do his processing and providing the raw milk, and do what Safeway did—furnish his own cartons and do his own delivery. That is why the split came about, Your Honor, because we were trying to break out, for him, what his costs would be if he did different segments of the operation.

Judge Hinkes: But coming back to the original question, in your discussions with Mr. Smith, did you talk to him about the origin of the 2-2-2 split?

The Witness: Yes.

Judge Hinkes: What was the origin?

[6416] The Witness: As far as we were concerned, the basic origin was the type of arrangement that Safeway was making with the different areas. We frankly had never heard of it before that, until Safeway came along and approached us, and asked us if we would be willing to just do the processing—they would give us 2 cents a quart to do the processing, and they would be willing to do their own delivery and furnish their own cartons.

Judge Hinkes: That was 2 cents. Right.

The Witness: That is right.

Judge Hinkes: I am talking about the 6 cent formula?

The Witness: Or they said they would also be willing to let us buy the carton and give us the 2 cents, but they preferred to buy it themselves be-

cause they felt they could buy it from the American Canco cheaper, because of their volume.

Judge Hinkes: The other 2 cents was—

The Witness: What they told us they had estimated their delivery would run, approximately, and what it was running, I believe, at that time, in the Washington—I believe the fellow that came to see us was the fellow running the Washington area. I know he told us that is approximately what his Washington delivery was running. That is how this all evolved, was from Safeway.

[6417] Judge Hinkes: I see. Very well.

By Mr. Curnin:

Q. Mr. Abrahms, what was the duration of your milk supply arrangements with stores in the period 1965 to 1970? A. Our only arrangement is that on any of our large customers, we would appreciate it if they would give us ample notice because of the raw milk supply, but basically, they are under no legal obligation to do so and we have lost customers on as little as 14 days notice.

Q. No further questions.

Mr. Mathias: I don't believe we have extensive cross, but we do have a few questions, and I believe everybody is a little tired and hungry at this point.

Mr. Curnin: I believe this may be an imposition on the lawyers and what not, but Mr. Abrahms is on vacation and he has other plans and arrangements. I realize the importance of the proceeding and what not, but if, in fact, complaint counsel's cross would only be a few questions, and then I would ask the indulgence of the court and complaint counsel if we could take a 5 minute recess and come back —it may well be we will be through at 1:30.

Judge Hinkes: Only if I can be assured it wouldn't be longer than 1:30. I don't think I would be warranted in going beyond that point for everyone's sake here.

[6418] Mr. Mathias: I can't be sure I will be finished by that time but I don't know that I won't be, either.

Judge Hinkes: I do think, under the circumstances, we better take our lunch recess, at this time. I think that we can be back by 2:00, and hopefully complete the witness's testimony before too long, but from previous experience, I have found very unlikely conclusion to assume that we can finish with any witness within 30 minutes or less. There is no assurance, and then to take a lunch recess, at say, 1:30, is a little too much. I think we better stop now. I am sorry if we inconvenience you.

The Witness: The only problem is the last plane to where I am going to is 2:30.

Judge Hinkes: Leaves at 2:30? That is rough.

The Witness: Could we try and see if at 1:30, we are finished? If not, then we could break for lunch.

Mr. Mathias: I would hate to inconvenience Mr. Abrahms. If we take a few minutes break, possibly we can finish by 1:30 or quarter of 2, and take a late lunch. I am willing to try it.

Mr. Curnin: We appreciate it, Your Honor.

Judge Hinkes: All right. Let's take a short recess.

(Whereupon, at 1:00 p.m., a recess was taken until 1:05 p.m.).

[6419] Judge Hinkes: On the record. You may cross examine.

Cross Examination by Mr. Mathias:

Q. Now, Mr. Abrahms, this 2-2-2 formula that you discussed was basically based upon your costs at that time period. Is that not correct, sir? A. Basically. Correct.

Q. And for the area in which you were doing business. Is that correct, sir? A. Only that we had discussed, Mr. Mathias, with Safeway, and the fellow we had discussed it with in detail in Safeway, was running their Fort Worth plant, and one was running their Washington operation, and they came to Eultonville on a couple of occasions, because they were very serious about having us do their work or even contemplating buying our facility, at the time.

Q. Were you familiar with the Safeway method of operation in either Washington or the other area you mentioned? A. Yes.

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Testimony of Robert G. Havemeyer

March 26, May 14, 23, 28, 1974

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[6775] * * *

I was the principal speaker at the only seminar devoted to pricing, public seminar devoted to public pricing in the dairy industry in Chicago. I was on for a day and a half and another speaker for about a day and a half, as I recall. I have spoken at two seminars conducted by the Milk Industry Foundation on the subject of data processing.

I have appeared before and delivered a talk to an annual convention of the International Association of Milk Control Agencies, which is the association of state milk commissions.

I am on the faculty—this is beyond the dairy industry—but I am on the faculty of the American Management Association, I lecture on cost analysis, financial control, distribution analysis, subjects of that nature.

Q. To what extent has your professional career been devoted to cost accounting in the dairy industry? A. Since 1955 very largely devoted to that industry.

Q. Other than the reference to the American Management Association, are you associated with any other professional association? A. Yes, I am a member of the Institute of Management Consultants and I was one of the founding members of that organization.

Q. Did you at our request make a study comparing Bowman Quotation, marked CX 50, of August 1965 for A&P with Borden Quotation on Milk and Dairy Products, marked CX-62? [6776] A. Yes, I have.

Q. Have you prepared a chart at our request illustrating the results of that study? A. Yes, I have.

Mr. Falls: Your Honor, I would like to have marked as A&P Exhibit 100 a single-sheet exhibit

entitled "Comparison of Bowman, CX 50, and Borden, CX-62 (Borden Zone 1).

(The document referred to was marked A&P Exhibit No. 100 for identification.)

Mr. Mathias: Could we have a few minutes' break to xerox a few copies of the revised papers we received yesterday afternoon. I would like my accounting experts to be able to follow this and we have only the one copy.

Judge Hinkes: Yes, I thing we had better do that. This is a revised 100?

Mr. Mathias: They are underlying documents for 100. I don't know whether 100 itself has been revised or not.

Mr. Falls: No, it has not. We have no objection to that.

Judge Hinkes: We will take a short recess so you can xerox those copies.

(Whereupon, a brief recess was taken.)

Judge Hinkes: You may proceed, Mr. Falls.

By Mr. Falls:

Q. Let me hand you the document which has been marked RAPX [6777] 100 and ask you if that is a copy of the chart which you say you had prepared where you compared the Bowman and Borden quotes. A. Yes, it is.

Q. What underlying documents did you examine in order to secure the data necessary for these calculations? A. We relied upon CX 62, CX 50, CX 36, CX 42, CX 56. We also relied upon page 7 of a procedure outline prepared by the Borden Company, which I believe is A&P Exhibit 66 in this hearing. We relied upon a Borden internal document for its Region 7, which I think is A&P Exhibit 73, and we relied upon Borden summary billings to A&P stores in May and September 1965.

Testimony of Robert G. Havemeyer

Q. Mr. Havemeyer, and let me point out, Your Honor, we now have up on the easel a copy which I believe to be an identical copy of RAPX Exhibit 100. The title of A&P Exhibit 100 indicates it relates to Borden's Zone 1, is that correct? A. That is correct.

Q. That is a comparison of the quotes as they relate to Borden Zone 1. A. Yes, sir.

Q. Approximately what percentage of A&P sales were in Zone 1? A. Approximately 75 percent.

Q. Turning first to the figure of $2,521,294.96, which appears at the top of the first column on A&P Exhibit 100, would you explain what that figure represents and perhaps at this [6778] point you could use the large copy of the exhibit mounted on the easel. A. This figure represents the price A&P would have paid Borden under the prices quoted in CX 62, based upon the annual quantities listed in CX 62 in Borden's Zone 1 for homogenized milk in paper container in three sizes—quarts, half-gallons and gallons with an adjustment, an adjustment being an adjustment in the price of raw milk.

Q. Would you explain what that adjustment was made and how it was made? A. In Borden's quotation the prices quoted in CX 62 were based upon a raw milk price of $4.29 per hundredweight. Borden included a provision to change the quoted price depending upon changes in the price of the raw milk. We used the methodology in the table which is laid out in CX 62.

Q. To adjust for what raw milk price as opposed to $4.29? A. A price of $4.32 because the Bowman price was based upon a raw milk price of $4.32. To make a valid comparison between two quotations, we made use of this adjustment which was a feature of the Borden quotation.

Q. If I understand you, the Borden price as adjusted was based on $4.32 per hundredweight, as was the Bowman price? A. That's right.

Q. From what source was the annual quantities of A&P's

purchases determined in connection with the calculation of this [6779] figure of $2,521,294.96? A. These annual quantities for Borden Zone 1 are laid out and stated specifically in CX 62 for Zone 1.

Q. Again referring to the raw milk price adjustment of, to make a conversion from $4.29 to $4.32, you mentioned that this was taken from the Borden quotation. Can you identify the particular schedule involved? You can go back to your seat and locate the exhibit, if you wish. A. In CX 62, pages N and O, the change is shown in the price for a quart, half-gallon and gallon package of milk for each penny change in the hundredweight price.

Q. So you directly applied that schedule in making the adjustment you have described? A. That's right.

Q. Mr. Havemeyer, let me direct your attention to the second figure in the first column, which is $25,345.75. Let me ask you what that represents. A. This represents an adjustment for a value of one-tenth percent in butterfat being the butterfat level in the homogenized milk. The reason for this is the Borden quotation was based upon a butterfat content of 3.4 percent and Bowman's quotation was based upon a butterfat content of 3.5 percent, and Borden's CX 62 showed how such an adjustment would be made.

Q. Again you used the methodology described in the Borden Exhibit CX 62 in making that adjustment? [6780] A. That's right.

Q. Could you identify where that schedule is to be found? A. CX 62, page X, entitled "Formula Price for Raw Milk."

Q. So that the butterfat adjustment you just described amounted to $25,345.75? A. That is correct.

Q. Do I understand the following figure, $2,546,640.71, represents the Borden quoted price on the homogenized milk in paper containers after both the raw milk and the butterfat adjustment? A. That's right.

Q. Could you next turn to the figure of $2,514,530.13,

which is the first figure in the second column, and tell us what that represents and how it was determined. A. That represents the price that the A&P Company would have paid to Bowman had it accepted Bowman's prices as laid in CX 50. That is based upon the—

Q. This is for the same products? A. For the same products of quarts, half-gallons and gallons of homogenized milk in paper containers using the same quantities specified in Borden's CX 62, this includes an adjustment.

Q. Would you tell us generally the nature of that adjustment? A. The two quotations were presented in five geographic areas called zones and they did not coincide. We made an adjustment to put Borden's Zone 1 on a comparable geographic area with [6781] Bowman's quotation. So, the prices would reflect the same areas.

Q. Have you at our request prepared a series of charts to illustrate the geographical difference to which you have just referred? A. Yes, charts like this have been prepared.

Mr. Falls: I would like to have these charts marked A&P Exhibit 101-A, B and C.

(The documents referred to were marked A&P Exhibits 101-A through 101-C for identification.)

By Mr. Falls:

Q. Mr. Havemeyer, we have put up on the easel here the document which has been marked as A&P Exhibit 101-A. This is a chart you prepared, is that right? A. That's right.

Q. Would you explain what it shows? A. This shows the location of towns in which A&P had stores or at least those towns which were identified in both the Bowman and Borden quotations as to where A&P had stores to be served under the private label bids. It is coded first in color with Bowman being red and Borden being blue. It

is further coded as to the shape of the symbol to indicate the frequency of delivery which was indicated in the quotations.

Simply, in the case of Bowman as in the case of Borden a round circle, solid circle, indicates that six-times-per-week [6782] delivery was anticipated.

A solid square, either red or blue, indicates that three-times-per-week delivery was anticipated.

A square which is white in the center and that is blue indicates Borden anticipation of five-times-per-week delivery. Although Borden had made notations about four-times-per-week delivery in its bid, it actually identified no stores where there were to be four-times-per-week delivery, so you will not find there any of the blue squares which are half-shaded and half-white.

Q. Let's turn to A&P Exhibit 101-B and let me ask you to explain that one, Mr. Havemeyer. A. This is a photograph of the same map which you have previously looked at with an overlay on it; that is, all the symbols, dots and squares are identical to those seen on 101-A.

The red shaded areas indicate the zones as outlined in the Bowman quotation. The heavily shaded area, the solid shaded area, indicates it is Chicago metropolitan area.

Q. Is that Zone 1 or Area 1? A. It is Area 1 as indicated here by my pointer. Its so-called Area 2 could be described as Northwestern Illinois. Its Area 3, indicated by the slanted lines and as indicated here, could be described as North Central Illinois.

It called Area 4 with vertical stripes was its portion of Indiana and, finally, its Area 5 over on the West extends [6783] over into Iowa, but also includes parts of Illinois. So, these are the five areas or zones which have been specified in the Bowman quotation.

Q. Will you now turn to A&P Exhibit 101-C and explain what that shows? A. A&P Exhibit 101-C is a picture of the original map with the same indications of town loca-

tions, with the same red shaded areas as shown on 101-B and with a second overlay of blue representing the zones which were described in Borden's quotation, CX 62. This gets a little more difficult to follow, but I will outline the areas. I am now talking about the blue outlined areas.

Borden's Zone 1 is that which has the small dots in it and you could generally describe it as the Chicago metropolitan area, but also including a section of the northwestern portion of Indiana. I will trace its outline with my pointer here. This goes over into Indiana, up to the lake and over to there.

Borden's Zone 2 was another part of Indiana, and I will trace that with my pointer.

Borden's Zone 3 is over here. It is this unusually shaped area coming over here as far West as Rockford, I believe it is, and down into Joliet.

Its Zone 4 was a peculiarly shaped area including a section of Indiana, North Central and a good portion of Northwestern Illinois up to the Wisconsin line.

[6784] Zone 5 is over on the West including portions of Iowa and Illinois.

As we have been talking so far, we are focusing on Zone 1 Borden, which is generally its Chicago area and the northwestern portion of Indiana.

[6785] Q. If I understand you, Mr. Havemeyer, the particular area that created the necessity for the geographical adjustment you have referred to was this small piece of Borden Zone 1 that extends over into northwest Indiana? A. That is right.

Q. In the part that we have just pointed to, this little piece of Borden zone that sticks over into Indiana, in what Bowman zone did that fall? A. That is in—if you would refer to Exhibit 101, that falls in Bowman Zone 4, its Indiana zone.

Q. Did Bowman quote to A&P a different price for its Zone 4 and its Zone 1? A. Yes, it did.

Q. Is this the reason why some adjustment was necessary? A. That is right.

Q. Would you explain, Mr. Havemeyer, in a general way at least, how that adjustment was made—that is, the geographic adjustment with respect to this little piece over in northwest Indiana?

First, how many A&P stores were located in that particular segment? A. There were 15 A&P stores in this small segment in northwestern Indiana, and there were also 15 A&P stores in this Borden Zone 2 in Indiana.

Q. How many A&P stores were there in all of Borden's [6786] Zone 1? A. Something over 100.

Knowing that there 15 stores in that small section of northwestern Indiana as well as 15 stores in its Indiana Zone 2, we assume that the amount of fluid milk product as quoted under this bid would be about the same in both of those zones. On the basis of that, we made an adjustment.

Q. So you determined then the anticipated volume of sales of these 15 stores in the segment of northwest Indiana we have talked about? A. That is right.

Q. You applied to that volume of sales the Bowman Zone 4 price which was the applicable price? A. That is right.

Q. I think perhaps we can go back, Mr. Havemeyer, to A&P Exhibit 100, unless the Court would like some further explanation on the point at this stage.

Judge Hinkes: No; you may continue.

By Mr. Falls:

Q. If I understand your testimony, Mr. Havemeyer, the figure of $2,514,530.13 represents the Bowman quote for the annual quantity of quarts, half-gallons, and gallons of homogenized milk in paper containers after having made

the geographical adjustment which you have just described? A. That is right.

[6787] Q. Would you tell us what $32,110.58 represents, which is the second figure in the far right-hand column on A&P Exhibit 100? A. That is the difference in price under the Bowman and Borden quotations modified as described in the adjustments we have just talked about for raw-milk price, butterfat adjustment and geographic adjustment for the homogenized milk in paper containers, in quarts, half-gallons, and gallon sizes, and the fact that it is a positive number means that the A&P company would have paid $32,110.58 less had it accepted the Bowman bid than had it accepted the Borden bid.

Q. For these products? A. For these products.

Q. Let me direct your attention next, Mr. Havemeyer, to the figure $697,926.87, which is the fourth figure in the first column on A&P Exhibit 100, and ask you what that represents. A. This represents the price that the A&P Company would have paid to Borden for homogenized milk in glass gallon containers had it accepted the Borden quotation based upon quantities laid out in CX-56 and based upon billing prices which Borden was actually charging to A&P in the Chicago and suburbs area. The reason for this is that in CX-52 that container was withdrawn from the bid.

Q. Did you make the same raw-milk price adjustment in calculating that that you did in connection with the milk in paper [6788] containers or was that not necessary? A. Excuse me just a minute.

Yes, the same adjustment was made for the raw-milk prices.

Q. What does the number of $6,242.45 represent? A. That represents, as for the milk in paper containers, the value of an additional tenth percent butterfat content to bring the homogenized milk in glass containers up to the

same level of butterfat content as Bowman would have had in its quotation.

Q. What does the $592,880.88 represent? A. This is the price that A&P would have paid to the Bowman Company under the price laid out in the Bowman quotation.

Q. That again includes the geographical adjustment that you described before? A. Yes, it does.

Q. What does the figure of $111,288.44 represent? A. That is the difference between the figure for Borden of $704,169.32 and the figure for the Bowman quotation of $592,880.88. The fact that it is a positive figure means that A&P would have paid Bowman $111,288.44 less than if it had accepted the Borden quotation.

Q. Let's turn to the next row of figures, beginning with $3,250,810.03. Go along there and explain these figures. A. $3,250,810.13 is the sum of the figure for just the homogenized milk in paper containers of $2,546,640.71 and the figure for homogenized milk in glass gallon containers of [6789] $704,169.32.

Similarly, under the Bowman column, the figure of $2,107,411.01 is the sum of the Bowman quotation for homogenized milk in paper containers of $2,514,530.13 and $592,880.88, the latter representing the price A&P would have paid Bowman Company for milk in glass gallon containers.

These two figures which are on the line "Total cost of homogenized milk adjusted to 3 and a half percent butterfat" have their difference indicated in the right-hand column of $143,399.02. The fact that it is a positive figure indicates that A&P would have paid the Bowman Company that much less had it accepted Bowman's quote than it would have paid the Borden Company.

Q. This applies to all homogenized milk, whether in paper or glass? A. That is right.

Q. Would you next turn your attention to the next series of items opposite the heading "8 other dairy items on which

Borden offered private label"? A. Yes. In CX-62, Borden offered eight other items beyond the homogenized milk group in private label. When we went through the raw-milk price adjustment as described before, going from $4.29 per hundredweight to $4.32 per hundredweight and extending that modified price by the quantity set out in Borden's CX-62, we arrived at the figure of $1,063,967.48.

[6790] Similarly, when we applied Bowman's prices to those products and made the geographic adjustment that we described before, then we had, for Bowman, $1,082,157.59. Their difference is $18,190.11. The fact that it is indicated as a negative number means that A & P would have paid Bowman $18,190.11 more if it had accepted the Bowman quotation than had it accepted Borden's quotation.

Q. Again, would you go through the same procedure, Mr. Havemeyer—let me ask you one question. On that particular comparison, was any butterfat adjustment necessary? A. No, there was no adjustment necessary.

Q. Going to the next line, which is "Total 11 items on which Borden offered private label, adjusted to 3 point 5 percent butterfat," explain what that shows. A. This is the sum of two figures. In the case of Borden, it is the sum of $2,546,640.71, which is the price for homogenized milk in paper containers, three different sizes, and for the eight other items on which Borden offered the products in private label of $1,063,967.48.

The corresponding figures were added in the Bowman column to give us a sum of $3,596,687.72. The difference between the two figures on that line is $13,920.47. The fact that it is a positive figure means that A and P would have paid Bowman $13,920.47 less if it had accepted the Bowman quotation than if it had accepted the Borden quotation.

[6791] Q. This is a comparison of all of the 11 items which Borden offered in private label? A. That is right.

Q. And includes no others? A. That is right.

Q. Would you direct your attention next to the following

line figures appearing opposite the heading "10 additional items offered by Bowman in private or Bowman label and by Borden in Borden label only"? A. Yes, sir. As indicated by the footnote, these 10 items include sour cream in pints and half-pints, pints of sour half-and-half, and so forth, expressly set out in Footnote 3. They were not offered by Borden in private label but only in the Borden label.

Borden did not have an annual estimate of the quantity of these items which would be purchased by A&P. Therefore, we do some proportioning to determine approximately how much of those 10 additional items would be purchased based upon some billing summaries.

When we took the actual prices which Borden had been charging A&P and multiplied by the quantities which I just mentioned, we came up with a price of $692,850.94.

When we applied Bowman's prices to the corresponding products—and I use "corresponding" rather than "identical" because they were not identical; the Bowman would call them one [6792] way and Borden might call them another name, but as far as we could tell, they were the corresponding product—then we had a figure of $597,160.62, and that figure also includes a geographic adjustment I just described.

Finally on that line, a figure of $95,690.32 represents the difference between the Bowman and Borden quotations for these 10 additional items, and the fact that it is a positive number means that A&P would have paid Bowman $95,690.32 less if it had accepted the Bowman quotation than if it had accepted the Borden quotation.

Q. You mentioned this question of annual quantities. I gather that the annual quantities for the preceding products were obtained from the Borden bids on private label where those annual quantities were set out? A. Yes, sir.

Q. Since these 10 products were not included in those bids, there was no such convenient source of the annual quantities? A. That is right.

Q. So you had to derive those from Borden's actual billings? A. That is right.

Q. Would you turn, then, to the final line, in which the figures appearing opposite the total 22 fluid milk items— A. There is a figure under the Borden column of $5,007,628.45. This is the sum of three figures. It is the price for all homogenized milk items of $3,250,810.03 and the eight other [6793] dairy items on which Borden offered private label and, finally, these 10 additional items which Borden offered only in Borden label.

When we add the corresponding figures for Bowman, we find in the Bowman column, a figure of $4,786,729.22, and the difference between those two totals in those two columns is $220,899.23. The fact that it is a positive figure means that A&P would have paid Bowman that much less money for these 22 items if it had accepted the Bowman quote than if it had accepted the Borden quotation.

Q. So this is the difference in the quotes for all 22 items if A&P had taken all of them from Bowman instead of all of them from Borden? A. That is right.

Q. Mr. Havemeyer, were you able to compare in the same way the Borden and Bowman quotes for all zones? That is, this is a comparison with respect to Zone 1. Were you able to make the same comparison for all zones? A. No, we were not able to do that.

Q. Why was that? Should I put the maps back up? A. Yes, I think that would be helpful.

If I can direct your attention to this map, I want to emphasize the point that there is a lack of coincidence in these zones or in the boundaries. There is considerable overlap and there are pockets of overlap, if you will, where it [6794] might be Borden Zone 3 and Bowman Zone 2.

To be specific, for example, over here in a portion of central Illinois, north central Illinois, there is the Borden Zone Number 5, as indicated by this crosshatching. As

indicated by the red crosshatching going in the other direction, it is Bowman's Area 3.

Now, just as there was an area of overlapping zones there and different shapes and sizes of overlapping areas or pocket of overlap in these other zones, gave us a problem. We did not have in any of the quotations specific quantities of each of the milk items, the 11 items, which would be sold in those zones or those subzones. We just did not know how much of these dairy products would be sold here in these queerly shaped zones and all these zones of overlap.

As you can see, there are quite a few zones of overlap and peculiarly shaped areas, no regularity to it, and we simply did not have quotations telling us what the quantities would be in the areas of overlap, as I call them.

Secondly, there was, in the Bowman quotation, a somewhat vague reference to an adjustment on raw-milk price, and I read from CX-50 on page 4: "In the event that stores are served in areas where there is no Federal milk order or where the superpool price is not effective, we will adjust the quoted prices in that area."

Finally, we did not have available to us, although we tried [6795] to get it, information in other areas beyond Chicago and suburbs which corresponded to the billing summaries which we were able to use in the case of prices for glass gallon containers and in the case of both prices and quantities which we used with respect to these 10 additional items offered by Borden in Borden label only. The information could not be developed beyond the billing summaries available for the Chicago and suburbs areas.

So, for these three reasons, we could not make this kind of analysis of this type in the other zones.

Mr. Falls: We are nearly finished with this exhibit. Could we have about a three-minute recess so I can see if there is anything else I have on this?

Judge Hinkes: Yes. We will be in recess for a few minutes.

(A short recess was taken.)

Judge Hinkes: Mr. Falls.

Mr. Falls: I have just two more questions.

By Mr. Falls:

Q. I direct your attention to the next to the last heading from the bottom on A&P Exhibit 100, which reads: "10 additional items offered by Bowman in private or Bowman label and by Borden in Borden label only." Do you have any comment with respect to the accuracy of that heading? A. Yes; the heading is slightly inaccurate, based upon my reading of Mr. Frank Cannon's testimony which I read in the [6796] last few days. As you can imagine, this was prepared some time prior to that. In Mr. Cannon's testimony, he said Bowman offered a few items in private label or Bowman label but that on the small-volume items they were going to be offered only in the Bowman label.

However, he also said that the price would remain the same, where there was the option, whether they took it in Bowman or private label.

So the heading is slightly inaccurate in that Bowman did not offer low-volume items in the private label, but the price did not change.

Q. But the price was not altered? A. The price is not altered.

Q. I believe, although I could be in error, that in your testimony with respect to the comparison of the Borden and Bowman quotes on glass gallons of homogenized milk —I believe you said a raw-milk price adjustment of the kind you describe was made in connection with that comparison. Is that correct? A. If I said that, that was wrong. There was no adjustment necessary for the raw-

milk price on glass gallon containers, the reason being that this item was not quoted in CX-62 and, therefore, did not have the price adjustment to go along with it—more specifically, the price which we have used to develop the figure of $697,926.87 based upon the actual price charged by Borden to A&P in the Chicago and suburbs area [6797] during 1965.

Q. In September of 1965? A. September of 1965, yes, sir.

Q. That price was based on a raw-milk price of $4.32 per hundredweight? A. That is right.

Mr. Falls: I would like to offer into evidence A&P Exhibits 101-A, B, and C.

Mr. Mathias: Your Honor, may I have some voir dire?

Judge Hinkes: Very well.

Voir Dire by Mr. Mathias:

Q. Mr. Havemeyer, there were certain underlying computations made by you in connection with the preparation of Respondent A&P Exhibit 100 for identification, were there not, sir? A. Yes.

Mr. Falls: Let me have marked as A&P Exhibit 102 a multipage document which is entitled "Location of Indiana A&P Stores by Bowman and Borden Pricing Areas."

(The document referred to was marked Respondent A&P's Exhibit 102 for identification.)

Mr. Falls: We will mark as A&P Exhibit 103 a document consisting of four pages entitled, on the first page, "Price Adjustment Demonstration—Zone 1, Adjustment Prices (CX-62) from Raw Milk Price of $4.29 Per Cwt. to Raw Milk Price * * *

* * * * *

Testimony of Robert G. Havemeyer

[8658] Q. Would you refer us to the pages which would show it? A. Please pull out pages 23 and 24. There is one other page, pages 11 and 12. If you will keep your fingers in those pages. So we are going to refer to pages 11, 12, 23 and 24, and only in the case of Wilco Food Center will we refer to another page.

Now, page 11 shows the information that was used by Case & Company to determine the type of service. Let me please indicate a typing correction on that, on page 11. In the first group of stores, the last two names, Wallies and Wilco, there should be an X under the column entitled, Testimony of Store Operator, and also on Wilco's line, reading across towards the right, the X under "Full" is incorrect—it should be under "Limited Service".

On the next line, the first Delocks, the extreme right hand column where it says, Collect for Month, that figure should not be zero, it should be 4. Those are the corrections on the page.

As I said, this page indicates how we determined the type of service and the source from which we determined it. So, for the various A&P stores and complaint customers which are in the first grouping, A&P and Wilco got limited service and the other stores got full service. All of those stores received 27 deliveries per month as indicated by the next column to the right, and all of those stores did not pay cash, * * *

* * * * *

[8952] Judge Hinkes: Off the record.

(Off the record discussion).

Judge Hinkes: On the record.

By Mr. Falls:

Q. We are now in A&P Exhibit 170, about half way back in the book. The sheet I want to refer to is a sheet entitled

Information Used By Case & Company to Determine Type of Service and Appropriate Wholesale Delivery Item Standards, Bordens O'Hare Branch, Wholesale Route Customers, March 1966. It is about ⅔rds of the way back in the book and comes right after the couple of sheets that set out the Case & Company Delivery Time Standards.

Judge Hinkes: That is Attachment VIII.
Mr. Falls: It looks like this.
Mr. Mathias: I have it now.

By Mr. Falls:

Q. Referring to that exhibit, Mr. Havemeyer, which has to do with the classification of these customers as to the type of service they receive, would you explain, in a little more detail than I think was done on either direct or cross, just how those customers were classified, and on the basis of what information? A. First, the form itself indicates, by X marks in the appropriate column, the source document of information which was used by us in determining the type of service, and then [8953] if you move towards the right, under a column entitled, Type of Service Described, you find X marks under the column, Limited, or the column headed Full Service. The left hand columns indicate from whence we got our information and the column I just mentioned, headed Full Service or Limited Service, indicates our conclusion. In the case of the A&P stores, the contract which is shown in CX-62 indicated the form of Limited Service that was to be provided, no special deliveries, essentially a drop type of service, and various other conditions which we classified as Limited Service.

Now, no such single source document was available for the decision as to the type of service rendered to the complaint customers, so we will go down the list, starting with Mayfair Foods.

Testimony of Robert G. Havemeyer

Now, there was testimony of a store operator for Mayfair Foods, and as we analyzed that testimony, we found that the merchandise was delivered to the dairy case, right to the dairy case. We found that the Borden driver checked the date of a stock—that meant he had to look at the merchandise that was remaining and find out if the remaining stock there was still within the so-called code date and if it was out of code, he removed the out-dated merchandise and there were even occasions when the drivers would rotate the stock in the dairy case. By that we mean he would bring forward to the front of the case the merchandise which was [8954] still within the code date, but closest to falling outside of the code date—in other words, to try to make certain that merchandise does not become out of date by the next delivery, and Borden took back the outdated merchandise. That was part of their risk or cost of doing business with Mayfair Foods.

We also found that on occasion there were special deliveries made to Mayfair Foods so we have the driver who is handling merchandise, going to the dairy case, rotating the stock, inspecting the stock to see if it is within code. He is replacing the stock. We concluded, on the basis of that, Mayfair Food was receiving full service.

Now, we go to James Cox, and there was also testimony in regard to James Cox, which I think is also known as Jim's Grocery store, and I read the testimony of that gentleman. Now, Cox did not have a back room cooler so the deliveries were made to the dairy case. The driver made out the order, the driver cannot make out the order without at least looking at the stock, what is left. Generally speaking, the driver will build up to a certain inventory point in a case. That is, on a Thursday he knows from experience or discussion with the owner, there ought to be—pick a number—50 half gallons of homogenized milk. In order to know how much to put into the case to make it reach 50, he has to count how much is there, so he has

to inspect the stock [8955] in the case. The driver puts the milk in the case and rotated the milk in the dairy case so he certainly handled the merchandise. Borden ran the risk of spoilage. If there was out-of-date merchandise, Borden took it back so the driver had to handle that, so the merchandise was delivered to the case, the driver inspected the stock, rotated the stock, took back the out-of-date merchandise, so clearly there was a full type of service for James Cox.

Now, as we come down to the next group of stores, 8 stores, we relied upon the stipulation which had been entered into between counsel, and so we analyzed the stipulations for the next group of 8 stores.

In the case of Cardinal, the stipulation indicates that delivery is made to the cooler and the display case, that the stock is rotated, that the driver had to make out the order and the driver replaced out-of-date merchandise—clearly the type of terms and conditions which qualify under the definition of Full Service.

Now, in the case of Bill's market—

> Mr. Mathias: I don't mean to interrupt, Your Honor, but I am wondering if it is necessary to go through and spell out in detail what is in these stipulations and what is in testimony.
>
> Judge Hinkes: I think we can probably dispense with that. I think it is sufficient to say that you examined the [8956] testimony and came to the conclusion it was Full Service based upon his testimony or upon the stipulation. I don't think we have to now recite the details of the testimony or the details of the stipulation. They will speak for themselves.
>
> Mr. Falls: I just want to be clear as to the elements on which the witness did rely in reaching this

conclusion and there are some little differences from store to store.

Judge Hinkes: There may be but whatever differences there are, are not differences based upon Mr. Havemeyer's observation—they are based upon a witness's testimony, which is in the record, or a stipulation which is in the record, or somebody else's testimony, like Mr. Pergler, which is also in the record, and there is no point in repeating it because, as a matter of fact, if Mr. Havemeyer has a misconception of what that testimony or record consists of, it does no good to have him repeat that misconception.

Mr. Falls: Let me ask a couple more questions.

By Mr. Falls:

Q. Looking at the several customers—there are 8 customers as to whom we relied on stipulation and concluded they received Full Service? A. Yes, I did. I did examine the stipulations.

Q. Did you find any of those customers receiving service sufficiently different from, for example, what you described [8957] with respect to Mayfair or James Cox, to lead you to the conclusion that the service they received should not be characterized or classified as Full Service? A. No. The conditions were such that we came to the same conclusion for that group of 8 as we did for Mayfair and James Cox.

Q. With respect to the remaining customers, at least down through Joe Milecki, do I understand that you classified them as full service based on route book notations saying either pack or check and pack, and Mr. Pergler's testimony with respect to what those notations meant? A. That is true with the exception of Strickland's, no. 256, which I think I should address separately.

Q. All right. Would you address that one. A. Starting with—

Judge Hinkes: Shouldn't you also speak of Madison LaVeigne and Bell Park?

Mr. Falls: I really addressed my question to only those down through Joe Milecki, but I think you are right—those 2 are in a separate category. Would you address yourself to those stores?

The Witness: Starting with Mayfair Foods, down through Joe Milecki, we found route book notations of "check and pack" or "pack". Mr. Pergler's testimony indicated what that meant, and in reading his definition of what those [8958] notations meant, we concluded that those customers were receiving Full Service. In the case of Strickland, no. 256, there was no notation in the route book for March 1966, but there was a notation in the route book for February 1966. There would be no reason to believe the conditions would change, but rather that the route man had just not posted it in the March book so the book for February 1966 indicates a notation which also led us to conclude, again, based upon Mr. Pergler's description or definition of those notations, that Strickland also received Full Service.

Judge Hinkes: What was that notation?

The Witness: It was either check and pack or pack. That takes us through Joe Milecki.

Now, in the case of Madison LaVeigne and Bell Park Foods, there was no testimony, no stipulation, no route book notation, and Mr. Pergler was asked about those 2 customers and after reading his description of how they were served, it led us to the conclusion those 2 customers were also receiving so-called Full Service.

* * * * *

[9098] Mr. Mathias: Yes, sir.

Judge Hinkes: All of this, I think, is a belated attempt at compliance, and I don't think it would be

fair to Complaint Counsel to burden him with the necessity of examining documents which come in so late in the proceeding. Coupled with this, if it is true that the matter has already been covered in testimony, I think that further examination, pursuant to this document, which is questionable under the circumstances, would be inappropriate. I shall not permit the discussion of this document. You may explore the issue with your witness, if you care to, but I don't think you would be entitled to discuss this particular exhibit.

Mr. Falls: Let me put a few questions to the witness, along those lines, without reference to the exhibit, Your Honor.

Judge Hinkes: All right.

By Mr. Falls:

Q. Mr. Havemeyer, did you make the study of the discounts actually received by the various O'Hare customers in comparison with the discounts to which they would have apparently been entitled under Borden's published discount schedules? A. Yes, I did.

Q. Did you find that the O'Hare customers, in fact, received the discount which the published discount schedule said they were entitled to receive? [9099] A. No. In fact, very few received what the discount schedule would have indicated.

Judge Hinkes: Does that mean they got more or less?

The Witness: They got different.

By Mr. Falls:

Q. Can you generalize as to whether, in general, these customers got more or less than the published discount? A. In general, they got more.

Q. Do you know, in how many cases all of these customers received less than the published discount?

Mr. Mathias: I would like to note the witness is now going to look at the document which he has just been told not to discuss.

Judge Hinkes: Well, there is a little difference. I think the witness is entitled to look at anything that will help him recall the answer, even if it is a document that is not receivable in evidence.

I would ask you though, Mr. Havemeyer, to first attempt to answer without looking at anything, so that we can be sure that your answer, if it is dependent upon a document, is so noted on the record.

Can you answer without looking at the document?

By Mr. Falls:

Q. Let me make one thing clear—is it a fact the customers you are now speaking of are O'Hare customers listed [9100] on Exhibit 183? A. Yes, they are those customers.

Judge Hinkes: Do you recall the question that was just asked?

The Witness: Were there any customers that received less than what the discount schedule would indicate?

I knew there were a few but I did have to look at it to remember there were only 2.

By Mr. Falls:

Q. Now, with respect to those 2 who received less than the published discount, can you tell us who they were and in what amount a discount they received was less than the published discount? A. I would have to look at the document.

Q. May I ask you to refresh your recollection then by

looking at the document? A. Edward Marszaick received 0.6 percent less, and Bruno Nalepa received 2.0 percent less than would be indicated by the discount schedule.

Q. What was the maximum amount in excess of the published discount any customer received? A. I believe the maximum amount in excess of the schedule was 12 percent.

Q. Do you know who received that? A. No. I would have to look at the schedule for that.

[9101] Q. Could you ascertain that by looking at the document? A. Yes, sir.

Bill's Market.

Q. What was the next greatest, after 12 percent? A. 10 percent.

Q. Were there a number of customers who received 10 percent more than the published discount? A. Yes.

Q. Can you identify that? A. I have to look at the document for that.

Q. Would you do so, please. A. Strickland Store No. 256 received 10 percent more than the schedule would indicate. Bill's Market No. 194 received 10 percent more. Gene's Food Shop received 10 percent more.

Q. Is there one other that received almost 10 percent? A. There is one that received 9 point something. Barney Trainor received 9.6 percent more than the schedule.

Judge Hinkes: Then, you have finished your examination of Mr. Havemeyer. Is that correct?

Mr. Falls: Excuse me just a moment.

I think I have completed my examination with 2 possible exceptions, Your Honor. One is there may be some further redirect occasioned by Mr. Mathias's additional examination.

Judge Hinkes: Yes.

* * * * *

Testimony of Eugene Dischner

April 15, 1974

* * * * *

[7166] Q. Did you solicit Consolidated Foods? A. Yes, sir.

Q. Would you explain what Consolidated Foods was at that time? A. Consolidated Foods was a grocery warehouse that supplied independent groceries with their supplies of groceries. They had buying programs so that they could purchase other items through the warehouse.

Q. This warehouse was located in the Chicago area? A. Yes.

Q. And the customers they served were located in the Chicago area? A. Yes.

Q. Approximately when did you solicit that business? A. Early in 1968.

Q. With whom did you deal at Consolidated Foods? A. Principally with a gentleman by the name of Dell Johnson.

Q. What was his title or position? A. I do believe his title was Sales Manager.

Q. Did you have more than one meeting with him? A. Yes.

Q. Approximately how many did you have? A. I would say in the course of obtaining the business we must have had seven or eight meetings with him.

Q. These were meetings generally between you and Mr. Johnson? [7167] A. And also with the sales manager, Chicago, James Jensen.

Q. Mr. Jensen went with you on these calls? A. Yes, sir.

Q. Did you quote prices to Consolidated Foods? A. We made a proposal, yes.

Q. Was this proposal at Borden's list price less a discount? A. Yes.

Q. What was the discount that you quoted to Consolidated Foods? A. If I can recall, it was approximately 35 percent less, plus two percent to the warehouse.

Testimony of Eugene Dischner

Q. What was the two percent for? A. The two percent was for the warehouse to do the billing and also pay for the milk.

Q. Did the warehouse guarantee the payment? A. They guaranteed the payment of every drop of milk we delivered.

Q. These were not stores owned by Consolidated. A. No, sir.

Q. These were their customers? A. Right. They were all independent groceries.

Q. You secured this business? A. Yes, we did.

Q. How were the deliveries made, to the warehouse? A. No, to the stores.

[7168] Q. Mr. Dischner, I hand you what has already been received in evidence as RBX 3-A and subsequent pages and ask you whether you have seen that document before the original thereof? A. Yes, I have.

Q. By whom was that prepared? A. Jim Jensen and I.

Q. What does that represent? A. This is a proposal to White Hen Pantry and Markets for their milk business.

Q. Did you take part in the presentation of that proposal? A. Very much so.

Q. With whom at White Hen did you deal? A. Mr. Diana.

Q. What was White Hen as you understood it at that time? A. White Hen was a group of convenience stores located in the Chicago area.

Q. What was Mr. Diana's position? A. I believe he was the General Manager of the White Hen Pantry Markets.

Q. About when did you meet with Mr. Diana? A. I can't recall the exact date—sometime early in the year.

Q. Of 1968? A. Yes.

Q. This was your initial meeting with him? [7169] A. Correct.

Q. Who was present at this meeting? A. James Jensen, Mr. Diana and I.

Testimony of Eugene Dischner

Q. Would you please tell us in substance what was said at that meeting. A. Of course, they had what we thought was a very good dairy business. They had said they would like to have a milk proposal broadened. So, in the course of time, in seeing what all he wanted, deliveries and so forth, then Jim Jensen and I put together this further proposal for their milk business.

Q. You presented RBX-3 to him? A. This proposal, correct.

Q. Was it presented on or about the date it bears? A. That is the date it was presented.

Q. Did you subsequently have any conversations with Mr. Diana about whether or not the proposal was acceptable? A. Yes.

Q. Where did that conversation take place? A. In his office.

Q. With reference to the time that you presented the proposal marked RBX-3, about when was this? A. It would be approximately seven to 10 days following the proposal.

Q. At this particular meeting you were present and Mr. Diana, was Mr. Jensen also there? [7170] A. Yes.

Q. Was there anyone else there? A. No one else that I recall.

Q. What was said at that meeting? A. That we were not competitive and we did not get the business.

Q. Is that what Mr. Diana said? A. That is correct.

Mr. White: Can we go off the record a moment?
Judge Hinkes: Yes, off the record.

(Discussion off the record.)

Judge Hinkes: On the record.

Testimony of Eugene Dischner

By Mr. White:

Q. Mr. Dischner, I hand you a document which has been marked for identification RBX-22-A through U and ask you to briefly examine it.

(The document referred to was marked Respondent Borden Exhibit 22-A through U for identification.)

Mr. White: Your Honor, would you like an extra copy?

Judge Hinkes: Yes, if you have one, please.

By Mr. White:

Q. Mr. Dischner, could you tell us what RBX-22 for identification is? A. This is a copy of a proposal we made to the National Tea [7171] Stores for their business.

Q. Was this proposal submitted to National Tea on or about the date it bears? A. Yes, sir.

Q. Did you have anything to do with the presentation or submission of this proposal? A. Very much so.

Q. Would you please explain to Judge Hinkes what you had to do with its presentation? A. Between James Jensen and I we put the whole proposal together and went down and submitted it to National Tea.

Q. You have testified that it was submitted on or about the date it bears. A. Yes.

Q. To whom was it submitted? A. Mr. Andrews.

Q. He is the gentleman referred to in RBX-22-B? A. In the cover letter, yes.

Q. Where did the meeting take place? A. At their offices, Division Street, Chicago.

Q. At the address also indicated on the letter? A. Correct.

Q. You present, Mr. Jensen was present and Mr. Andrews? A. Correct.

Q. Was anyone else present? [7172] A. No one else.

Q. Would you tell us, if anything, was said at that meeting? A. We went through our whole proposal to try to obtain the business.

Q. Before this meeting with Mr. Andrews on about November 21, 1968 had you met with him earlier? A. Yes.

Q. More than once? A. I would say we called on him at least twice before we made the proposal.

Q. In what general period of time would those calls have been? A. Approximately a month prior to the proposal.

Q. When you say we, you mean you and Mr. Jensen called on him. A. That is correct.

Q. Would you tell us what, in general, those one or two visits involved? A. Talking about their overall business, getting a store listing, where all the stores were located, seeing what labels they wanted to use.

Q. Who was serving National Tea at that time with milk products? A. Hawthorn melody.

[7173] Q. Borden was not serving this account? A. No, sir.

Q. Subsequent to submission of the proposal marked RBX-22, did you have any further conversations with Mr. Andrews? A. Yes.

Q. About when? A. I would venture to say a period seven to 10 days after the proposal was put in we called back on Mr. Andrews to see if we were successful in getting the business.

Q. Again, when you say we, that was you and Mr. Jensen? A. That is correct.

Q. What was said? A. That our prices were not competitive and, therefore, we were not successful in obtaining the business.

Mr. White: Your Honor, I offer at this time RBX-22 A through U.

Mr. Stone: No objection.

Judge Hinkes: RBX-22 is received.

(The document referred to, heretofore marked for identification as Respondent Borden Exhibit 22 A through U, was received in evidence.)

By Mr. White:

Q. Mr. Dischner, are you familiar with the wholesale account known as K-Mart Foods? A. Yes, I am.

[7174] Q. When you came to Chicago in the first part of November 1967 was Borden selling to any K-Mart Food stores? A. We had just started.

Q. What city was that store located in, do you recall? A. No, I don't.

Q. I hand you a document marked for identification as RBX-23-A and 23-B and ask you if that refreshes your recollection as to location of the K-Mart store.

(The document referred to, was marked Respondent Borden Exhibit 23 A and B for identification.)

The Witness: Yes.

By Mr. White:

Q. Where was it located, sir? A. Hammond, Indiana.

Q. Would you please explain to us, if you can, what is the document marked RBX 23 A and B. A. This is a standard pricing page that K-Mart used.

Q. You described the form but what does this particular one represent? A. Pricing that we were selling them milk for in that store in Hammond.

Testimony of Eugene Dischner

Q. Was RBX 23 or the original thereof submitted to K-Mart? A. Yes, sir.

Q. On or about the date it bears? A. Yes.

[7175] Q. This was done by your staff? A. This was done by Mr. Jensen under my direction.

Q. Before this document was submitted to K-Mart, were you advised as to the circumstances surrounding Borden's pricing to K-Mart? A. Yes.

Q. By whom? A. Jim Jensen.

Q. What did he tell you? A. These were the prices that we had to have to meet competitive conditions in the store.

Q. Did he tell you who the competitor was? A. Yes.

Q. Who was that? A. Beatrice Creamery, Meadowgold.

Q. Meadowgold is their name or style under which they sell? A. That is correct.

Q. Where was the Beatrice Plant located? A. Joliet, Illinois.

Q. During this period we have been discussing namely November 1, 1967 through the end of 1968, was Meadowgold brand milk being sold in the Chicago area? A. Yes, it was.

Q. You mentioned Meadowgold was the competitor. Was K-Mart also buying from Meadowgold? [7176] A. Yes.

Q. So the K-Mart store in Hammond, Indiana was selling both Borden and Meadowgold. A. Yes.

Q. Subsequent to 1967 did Borden make sales to K-Mart at the prices shown here? A. Yes, sir.

Q. I direct your attention down the page to a line that starts "Discount and allowances." A. Yes.

Q. What discount, if any, does this indicate that K-Mart was given from these prices? A. Five percent.

Mr. White: Your Honor, we offer RBX-23 A and B.

Mr. Stone: No objection.

Judge Hinkes: RBX 23 is received.

Testimony of Eugene Dischner

(The document referred to, heretofore marked for identification as Respondent Borden Exhibit 23 A and B, was received in evidence.)

By Mr. White:

Q. Mr. Dischner, during the period October 1, 1967 through December 31, 1968, did you ever have any discussions with any representative of A&P regarding the price at which A&P would or intended to sell private label milk products at a store? A. No, sir.

[7177] Q. During this same period of time, did you have any discussions with any representatives of A&P as to the price at which A&P would sell or intended to sell Borden label products out of store? A. No, sir.

Q. During this same period of time, were there any discussions in your presence between any Borden employees or any A&P employees as to the pricing at which A&P would sell or intended to sell private label products out of store? A. No, sir.

Q. Were there any such discussions in your presence either with Borden representatives or with A&P representative concerning the price which A&P would sell or intended to sell Borden label products out of store? A. No, sir.

Q. During this same period of time, did you have any discussion or conversations of any kind with any representative of A&P regarding the pricing Borden would or might charge other wholesale customers? A. No, sir.

Q. Did any such discussions, whether they be with A&P personnel or solely with Borden personnel take place in your presence? A. No, sir.

Mr. White: Your Honor, that completes our direct [7178] examination.

There is one matter, Your Honor. In connection with counts 1 and 2, I understand A&P wishes to

have Mr. Dischner identify some documents. I don't know the procedure Your Honor wants to follow or how Your Honor wants to handle it, whether we should go ahead and complete the cross-examination now and come back to that since it really is a matter that does not relate to count 3 or whether you would like to have that take place first.

Judge Hinkes: I think we should complete count 3 examination, both direct and cross and then if Mr. Curnin wishes to, he may use the witness on direct examination as his witness for the purpose of identifying any documents that are not involved in the testimony given thus far.

Mr. Curnin, do you have any cross-examination at this time?

Cross-Examination by Mr. Curnin:

Q. You gave us your duties and responsibilities, Mr. Dischner, for the time period 11-67 through December '68 in reference to the Chicago metropolitan division if I understand your testimony correctly.

Did that division during that period of time cover the area of Gary and Hammond, Indiana? A. Yes.

[7179] Q. You also gave testimony regarding competition that you experienced from your major competitors and you identified them in your testimony this same period of time, it was true, was it not, that Borden had both a published list price and a published discount schedule? A. Yes.

Q. During this period of time, did Borden deviate from and have to sell below the published discount schedule? A. Competitive activities required that we did.

Q. Did competitive activity require such a selling below the published discount schedule on a fairly regular basis during this period of time, November 19, 1967 to December,

1968? A. When you say fairly regular basis, I would say yes.

Mr. Curnin: No further question, Your Honor.

Mr. Stone: Your Honor, the witness has been on the stand for quite some time and it is somewhat afternoon. I suggest we take our luncheon recess now and perhaps commence with cross-examination after the luncheon.

Mr. White: Your Honor, if it is not inconvenient we would like to finish. This man would like to go back.

Judge Hinkes: Off the record.

(Discussion off the record.)

Judge Hinkes: On the record. We will take a short recess at this time.

* * * * *

Testimony of William Corbus

April 18, 1974

* * * * *

[7326] * * *

Q. Did the A&P Tea Company introduce private label products—I am talking now about milk and dairy products—in both New York and Chicago? A. Yes. In 1964 we introduced it in New York and in Chicago in 1965.

Q. Could you tell us what the dollar saving was that was projected in New York at the time of the switch from brand label to private label? A. Yes. It was in excess of $1 million annually.

Q. Mr. Corbus, during the period 1964 through 1970 did A&P have a procedure that was to be followed by the buyers at the unit or the division level when they sought to either change a milk supplier or sought to change from brand label to private label milk, and if so, would you tell us what that procedure was? A. Yes. The company had a very definite policy. We asked and instructed the Divisional Purchasing Directors to contact responsible, reliable dairies and to obtain from them competitive bids for private label, analyze them, and then finally decide which in their opinion was the best one to submit to headquarters for review by our head milk buyer who at that time was Hershel Smith, and if in Hershel Smith's opinion the arrangement was a satisfactory one he would then discuss it with the Legal Department to eliminate as far as possible any [7327] possible legal complications.

Q. During this period of time then were the actual negotiations between the A&P representative and the potential supplier carried on by people at the unit and division level? A. Yes. At that time they were carried on by the local or divisional buyer.

Q. Has that procedure been changed? A. Yes.

Mr. Soeffing: I object, Your Honor. I think that goes beyond the scope of the dates involved, 1963 through 1970, and I am somewhat dubious about the relevance of such testimony.

Judge Hinkes: Mr. Curnin.

Mr. Curnin: Your Honor, I think that when the Court hears the testimony, and I realize the ruling has to be made prior thereto, but that this goes very directly and very clearly to the question of relief. We are talking here about procedures which have been in effect concerning the buying of this particular product and how that procedure was implemented at the various levels of unit division in headquarters. That procedure has been changed.

I think that the changes that have been made should be placed on this record and that Your Honor and any reviewing court should be aware of the steps or procedures that have been implemented to insure even greater control over the purchase of this particular product in the A&P Company. It is true that [7328] the change that has occurred is a change that was brought about subsequent to 1970 but it bears directly on this case because it relates to the procedures that are now being followed in connection with the solicitation and the purchase of milk and dairy products from suppliers all across the country.

Judge Hinkes: I will overrule the objection.

You may continue.

Mr. Soeffing: Your Honor, in that regard I am not going to question your ruling and I will abide by it but could we have a time period as to when this did happen?

Mr. Curnin: Yes, Your Honor. I will pursue the change, when it occurred and why it was brought about.

Testimony of William Corbus

By Mr. Curnin:

Q. Mr. Corbus, you have told us that this procedure has been changed. Would you tell us first when the change was implemented? A. The change was implemented in September 1973.

Q. Will you tell us what the change is and what new procedures have been implemented by the Great Atlantic & Pacific Tea Company in connection with its purchase of milk and dairy products throughout the country? A. Your Honor, we decided that it was better to bring the purchasing of milk for the entire company into headquarters for the reason that many of our local or divisional buyers [7329] simply did not have the expertise in the buying of milk that we felt our headquarters buyer would have and that we would have a better control, a firmer control, and more knowledgeable negotiation and for that reason at least it was under my direction to inform the Retail Division that from here on in after September of last year that the purchasing of milk and ice cream and other dairy products be brought into New York for handling under the direction of, it happens to be, Mr. Earl Pilgrim who has spent most of his business lifetime in the dairy industry.

Q. Would it be correct to say then, Mr. Corbus, that the purchasing of milk and dairy products for the tea company throughout the country has now been centralized under the direction and control of the headquarters buyer and that position is now being held by Mr. Earl Pilgrim? A. That is correct. There was one additional advantage due to the fact that the headquarters buyer had ready contact with our Legal Department which of course we did previously but there is an interplay of communication that was not possible under the previous arrangement.

Q. And now the headquarters buyer is familiar with the actual negotiations between himself and the dairy, which information was not personally known to the headquarters

buyer under the prior procedure. A. That is correct because the negotiations actually conducted [7330] in New York by our buyer there were directly with the supplier whereas before all the headquarters buyer did was to review what was done locally.

Q. And he would review what was submitted to him by the local unit or division personnel who had themselves conducted the negotiation? A. That is right.

Q. Now, Mr. Corbus, during the period 1964 to 1970 did A&P have a procedure that its unit or division buyers were to follow in soliciting quotes from suppliers, including dairy suppliers? A. Yes, we had a very definite procedure. First, of course, we have to be competitive. We realize that the consuming public was very conscious of the price of milk so that, number one, we did have to be competitive. Number two, we were not a price leader. We would meet competition but based upon our experience we had learned that if we did cut our price of milk that it was immediately met by our competition with the result that there was no particular advantage gained so far as we were concerned. In addition, we instructed our buyers that in their negotiations they were to inform the supplier when submitting his quotations to us that he should include a reasonable profit.

Now I am not prepared to say, nor do I know, what the supplier's costs were or what he would consider a reasonable profit but we felt that it was very important that this [7331] arrangement worked well for both sides. In other words, if it was one sided, it simply would not function and could not last.

Carrying it to a further extreme, if the supplier didn't make a reasonable return, we knew that sooner or later he would either have to discontinue being our supplier or go out of business which in turn would be to the disadvantage of the tea company since we need good, healthy suppliers and as many as possible.

Testimony of William Corbus

Q. Mr. Corbus, the duties and responsibilities of those in A&P responsible for purchasing products and those responsible for the sale of products in its stores, were these duties and responsibilities established throughout the company in its divisions and units as a matter of company policy? A. Yes. These policies were clearly spelled out both verbally as well as in written form.

Q. Under this policy who had the responsibility for establishing the retail price at which any product would be sold out of an A&P store, including milk and dairy products? A. The authority and sole responsibility for that was placed squarely in the hands of the sales manager at divisional level.

* * * * *

Supreme Court, U.S.
FILED
OCT 31 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume II
Pages 555a to 765a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1977

CERTIORARI GRANTED MARCH 20, 1978

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* A large number of the exhibit pages received in evidence during the proceeding below are handwritten notes, memoranda and accounting worksheets and calculations. The legibility of these exhibits is unavoidably impaired. Following the description of each exhibit is a reference to the witness through whom and the transcript page at which the exhibit was introduced.

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(1) Extra copy sent Harry
(2) Copy to Peartz
(3) Copies to HRF
Joe Malone
Orv Gase
Dick Warren
Stub Dugan

555a

December 28, 1964.

Mr. Harry L. Archer, Exec. Vice Pres.,
The Borden Company
350 Madison Avenue
New York, New York 10017.

Dear Harry:

I don't want to go into any detail concerning the recent many discussions and study sessions we have engaged in out here to put together a revised A & P quotation for the Chicago-Calumet Area. Suffice to say, we do have some new figures for you and, though we have not yet concluded that such a change can be made without creating a market upheaval, we know we will have to live with whatever happens - wrestling with the new problems as they develop.

Basically, after having talked with our folks in New York, Houston and Columbus, we have arbitrarily changed our approach of a 1/2¢ per point differential to a 1¢ per point differential between Private Label and Borden Brand for six only basic items.

This restriction to six items is extremely important to this whole consideration. Our records confirm that these six items represent approximately 70% of A & P's total volume. From our standpoint, primarily focusing on our cost problem, the restriction to six items protects plant efficiencies to a considerable extent, as well as distribution material handling. Our whole Woodstock approach was on the basis of palletization, as you know, and involvement of Private Labels for a number of customers on unlimited items, clearly will seriously dilute the efficiencies we anticipated.

We have more or less justified in our own minds this move to 1¢ by this limitation to main items only to be offered under Private Labels. We believe this is important to A & P and other

big customers, also. Many recent studies of the food chain business emphasize the efficiencies to be achieved through acceptance of palletized deliveries at the store level.

Attached is Sheet #1 headed "The Borden Company, Chicago-Calumet Area, Net Selling Price Quotation to A & P." This listing shows the net cost to A & P of Borden Label and A & P Label for the six major items. All other by-products would remain as they are today.

Again, it must be remembered that these six items represent approximately 70% of A & P's volume.

As with our first quotation, so your information will be complete, we are attaching two additional schedules, which detail our Milk cost and the price adjustment formula we would follow.

Just a couple of additional points, Harry. We have said all of this before many times, but, we do hope A & P will price this private label and the advertised brand the same, certainly to begin with. If private label out-of-store is dropped to reflect this 1¢ per point, this market will rock immediately, we think. We believe such a move on their part would destroy the present price level for advertised brands and would add explosive fuel to a war over the differential question. We know some competitors will be strongly opposed to a difference in price for a private label. One big decision we have to make has to do with how low we will go to force acceptance of a differential. We folded up in Wisconsin because of a "no sales below cost" stipulation in the Wisconsin Law. We have no such "out" in Illinois.

This is not exclusively a matter in our interest. We believe retailers' margins would eventually get caught in whatever upheaval takes place. With such a move on A & P's part - instead of an improvement in their overall margin, one point I am making is that their dairy department spread could collapse. If that should happen, they will not have gained anything by bringing in private label and, certainly, we will have been knocked to our knees.

Again, repeating myself, in Chicago we cannot yet bring into play any important modification of delivery to reduce our costs.

We are still frozen to a six day delivery, with a base pay and commission rate which results in a driver wage cost of approximately $7.29 per hour. This prevents, obviously, the kind of distribution economies which, for example, are a part of the Wisconsin pricing structure and we hope Mr. Smith will give this due weight. In both Columbus, Ohio and Houston, Texas (two places he specifically referred to when you and he were discussing our prelimiary Chicago quotation) greatly modified delivery systems are in existence.

Of course, Harry, absolutely basic to all this is our dependence on continuing to supply this account. I am extremely conscious of the difficult situation confronting you. We don't want this business to go up for grabs, naturally, and we do hope that this revision will prove satisfactory. We are encouraged to feel it should because of our talks with Ed Brennan and Dave Patterson, particularly. In New York, the differential between private label and advertised brands is 1 1/4¢ per point. In Columbus, it is 3/4¢ per point. Both of thesewere accepted by Mr. Smith. Actually, our 1¢ is midway between these two. We know this change from 1/2¢ will affect us in Central-Illinois and Iowa too, but we see no other course to follow.

We will be anxious to hear from you. Perhaps all further consideration of this can be held over until your return (Jack told me you would be away for a couple of weeks.) I think that would be good in view of Mr. Smith's position of control.

Many thanks to you.

Cordially,

RRM*mlb
attach.
cc Mr. J. B. Pentz.

Ralph R. Minkler.

THE BORDEN COMPANY
CENTRAL DIVISION
1021 S. KILBOURN AVENUE
CHICAGO, ILLINOIS 60623

558a

RALPH H. HOEKLER
PRESIDENT

December 28, 1964.

Mr. Harry L. Archer, Exec. Vice Pres.,
The Borden Company
350 Madison Avenue
New York, New York 10017.

Dear Harry:

I don't want to go into any detail concerning the recent many discussions and study sessions we have engaged in out here to put together a revised A & P quotation for the Chicago-Columbus area. Suffice to say, we do have some new figures for you and, though we have not yet concluded that such a change can be made without creating a market upheaval, we know we will have to live with whatever happens - wrestling with the new problems as they develop.

Basically, after having talked with our folks in New York, Houston and Columbus, we have arbitrarily changed our approach of a 1/2¢ per point differential to a 1¢ per point differential between Private Label and Borden Brand for six only basic items.

This restriction to six items is extremely important to this whole consideration. Our records confirm that these six items represent approximately 70% of A & P's total volume. From our standpoint, primarily focusing on our cost problem, the restriction to six items protects plant efficiencies to a considerable extent, as well as distribution material handling. Our whole Woodstock approach was on the basis of palletization, as you know, and involvement of Private Labels for a number of customers on unlimited items, clearly will seriously dilute the efficiencies we anticipated.

We have more or less justified in our own minds this move to 1¢ by this limitation to main items only to be offered under Private Labels. We believe this is important to A & P and other

CX

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This is not exclusively a matter in our interest. We believe retailers' margins would eventually get caught in that war upheaval takes place. With such a move on A & P's part - instead of an improvement in their overall margin, one point I am making is that their dairy department spread could collapse. If that should happen, they will not have gained anything by bringing in private label and, certainly, we will have been knocked to our knees.

Again, repeating myself, in Chicago we cannot yet bring into play any important modification of delivery to reduce our costs.

CX7E

We are still frozen to a six day delivery, with a base pay and commission plan which results in a driver wage cost of approximately $7.50 per hour. This prevents, obviously, the kind of distribution economies which, for example, are a part of the Wisconsin pricing structure and which Mr. Smith will give this city a fight. In both Columbus, Ohio and Houston, Texas (two places he specifically referred to when you and he were discussing our prohibitive Chicago quotation) greatly modified delivery systems are in existence.

Of course, Harry, absolutely basic to all this is our dependence on continuing to supply this account. I am naturally conscious of the difficult situation confronting you. We don't want this business to go on for quite unnaturally, and we do [illegible] will provide a satisfactory [illegible] to do [illegible] which [illegible] price basis. In Houston, the [illegible] is 2 1/2¢ per pound. In Columbus, it is 3/4¢ per pound. Both of these are quoted by Mr. Smith. Usually, our [illegible] higher than these two. We know this change [illegible] will affect us in Central-Illinois and Ohio too, but we can see other counts to follow.

We will be anxious to hear from you. Perhaps all further consideration of this can be held over until your return (Mack told me you would be away for a couple of weeks.) I think that would be good in view of Mr. Smith's position of control.

Many thanks to you.

Cordially,

[illegible]
[illegible]
cc: Mr. W. D. Peat. Ralph R. Whitlock.

CX7F

The Borden Company

Chicago-Suburban Area

Net Selling Price Quotation to A & P

(Related To the Present Announced Super Pool Class I Price of $4.22)

	Borden Label	Private Label
Homo V D Milk - Gal. Paper	$ .7371	$ .6771
Homo V D Milk - 1/2 Gal. Paper	.3685	.3385
Homo V D Milk - Quart Paper	.2001	.1901
2% - 1/2 Gal. Paper	.3453	.3253
Vitamin Fortified Skim - 1/2 Gal.	.3453	.3253
Half and Half - Pint	.2934	.2834

Delivery shall be as follows:

1. Six (6) day delivery per week with one (1) delivery per store per day.
2. Store-door deliveries - no in-store service.
3. No special deliveries.
4. No returns, except products inferior in quality and packaging at time of delivery.

CX76

FORMULA PRICE FOR RAW MILK

CHICAGO-CALUMET AREA

	Per Hundred Pounds
Announced Class I Super Pool Price - 3.5% B. F.	$ 4.2800
Market Administrator's Fee	.0210
Shrinkage 1%	.0045
Procurement, Field Service, Association Dues, Inner Zone Premiums, Direct Delivery Premiums, etc.	.2590
Total Cost of 3.5% Raw Milk F. C. B. Our Plant	$ 4.5645
To 3.4% B. F. Finished Product	.0740
Cost of 3.4% Finished Product	$ 4.4905

MILK COST BY ITEMS

Quart	2.15 pounds x $4.4705 per cwt.	=	$ .0961
Half Gallon	4.30 pounds x $4.4705 per cwt.	=	.1921
Gallon	8.63 pounds x $4.4705 per cwt.	=	.3858

CXTH

CHICAGO-CALUMET AREA

Price Change Per Unit

(Related to the Present Announced Super Pool Class I Price of $4.29 per Cwt.)

Increase or Decrease per Cwt.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0011	.0022	.0044
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216

CXTI

The following may provide some additional thoughts to support our position in Chicago.

The dairy cooperatives in the Chicago market are important to note. The five major dairies represent approximately 80% of total class I market sales. Since some dairies only have plant depreciation, (supplying traditional dairy products on an exclusive basis, i.e. Borden - A & P, Sealtest - Kroger, Meadow Gold - National Tea, Kraftdairy - Safeway, Foremost - Jewel) most of the dairy products are currently represented in the market by store numbers and any action implemented by any one dairy historically, has been immediately followed by both the service dairies and dairy retailers.

The politics and history of the milk wars between dairies of Chicago cannot be lightly considered. They have very strongly opposed their antitrust position in the past and will strongly oppose it when Congress (or anyone) pertains antitrust to milk.

The Borden label is a strong label in the Chicago market and is bound to receive additional emphasis with the opening of the new Modesto milk processing plant in January 1968.

Dairylea Borden's sales representatives are closely familiar with the sales and merchandising problems of each A & P store in the area. Their experience and knowledge are most valuable tools to the success of the program being considered.

The main stress cannot be given to the ability of Dairylea to

CX7J

serve the A & P account in the most efficient manner employing modern methods of production, distribution and account billing and record keeping which should accrue to the best interest of the A & P account.

The Woodstock plant is the most modern plant in the world. Every facet of automation available is employed in its operation. The distribution process also is directly linked to the automated plant process through a new distribution point constructed at O'Hare which employs the use of palletized loads, which have been found in food store studies to be the fastest means of moving large quantities of products. In the field of account billing and record keeping, I. B. M. computers will quickly furnish the data required in a manner that should keep the retailer's internal cost in this area at a minimum.

While all these elements do not directly show up in retailers cost area they are bound to be a most important fact in the store level cost of receiving deliveries.

No other dealer in the Chicago market is so equipped.

CX7K

566a

7/5/60

Schedule No. 4

Items	Estimated Savings Regarded Reasonably Certain			Estimated Savings Regarded Fairly Certain		
Raw Materials & Purchased Parts Costs	$	1	000	$	001	07
Labor		1	065		000	58
Transportation		2	643		001	35
Other Factory Costs		2	508		001	04
Total	$	1	073	$	004	04
Total Annual Purchases - Regarded		192	500	000		

Memo:
Total Raw Investment $ 5,245,833
Deduct w Raw Investment @ 5% 262,292
Cost Per Part 00137

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price - 3.5% B.F.	$ 4.2900
Market Administrator's Fee	.0200
Shrinkage 1%	.0045
Procurement, Bulk Tank Premiums Association Fees, Inner Zone Premiums, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$ 4.5645
To 3.4% B.F. Finished Product	.0740
Cost of 3.4% Finished Product	$ 4.4905

MILK COST BY ITEMS

Quart	2.15 pounds x $4.4905 per cwt.	=	$ .0966
Half Gallon	4.30 pounds x $4.4905 per cwt.	=	.1931
Gallon	8.60 pounds x $4.4905 per cwt.	=	.3862

CX 14A

Schedule #2

February 9, 1965

CHICAGO-CALUMET AREA

Price Change Per Unit

(Related to the Present Announced Super Pool Class I Price of $4.29 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

14C

CHICAGO-CALUMET AREA

Price Change Per Unit

(Related to the Present Announced Super Pool Class I Price of $4.29 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

CX 14C

Chicago-Calumet Area
Basic Calculation and
Private Label Quotation Schedule for
Quarts, Half Gallons and Gallons

(Items in Plastic Coated Paper)

	Per Quart	Per Half Gal.	Per Gallon
Raw Milk Cost	.0966	.1931	.3862
Container Cost	.0185	.0342	.0684
Production Expense	.0200	.0400	.0800
(A) Route Delivery Expense (Man and Truck only)	.0225	.0450	.0900
(B) Other Distribution Expense	.0125	.0250	.0500
Total Cost	.1701	.3373	.6746
Quotation for A & P Private Label	.1855	.3430	.6860
Borden gross profit per unit	*.0154	*.0057	*.0114

(A) Route Delivery Expense is based on the following:
(1) Six (6) day delivery per week with one (1) delivery per store per da
(2) Store-Door deliveries - no in-store service.
(3) No special deliveries.
(4) No returns, except products inferior in quality and packaging at time of delivery.

(B) Includes Truck Loading, Weekly Billing, Waste and General Overhead.

*Composite Borden Gross Profit Per Quart per detail below:

Item	Weekly Quarts		Borden Gross Profit		Total
Quart	40,668	X	.0154	=	$626.28
1/2 Gallon	202,960	X	.00285	=	$578.47
Gallon	57,204	X	.00285	=	$163.08
Total Points	300,832				$1367.75

Composite Borden Gross Profit Per Quart .0045.

CX 14D

28

February 9, 1965

[illegible]

[illegible]

[illegible]

(Related To the Present Announced Super Pool Class I Price of $4.29)

	Net for Borden Label	Net for A & P Private Label
Home D D Milk - Gal. Paper	$ .7371	$ .6860
Home D D Milk - 1/2 Gal. Paper	.3685	.3430
Home D D Milk - Quart Paper	.2000	.1853
2% - 1/2 Gal Paper	.3453	.3220
Vitamin Fortified Skim - 1/2 Gal.	.3453	.3220
Half and Half - Pint	.2484	.2730
(Above items account for approximately 70% of A & P total sales.)		
Chocolate Milk - Quarts	.2437	.2387
Buttermilk - 1/2 Gallons	.3685	.3085
Buttermilk - Quarts	.2000	.1950
Fortified Skim - Quarts	.1917	.1867
Whipping Cream - 1/2 Pints	.3068	.3018

In the above listing we have not included half and half quarts, sour cream, sour half and half, sour cream dips, triple whip and yogurt. Production of these items under private label, in addition to our regular brand, adversely affects production costs substantially because the items are required in limited quantity.

CX 14E

572a CX 15A

A+P Check

RRm 2/9.

A+P PL discussion started 2/8 at 3 P.M.

Lip 4A Lower

It came in manner diff than expected.

Bartels did not call RM

talked to
Elmer Schmidt called
Borden Taper when Elmer was in Local A+P
office on other matters

Wants quotes on PL
mills.

Data was prepared.

It's diff in 2d not to
work in Ala. Need more

CX 1613

Start with cost units
- Cost of sales
- Cost Rental
- Cost Oil
- Balance

Shows us to work on profit.

All items "?"

Return on "By Product"

6 main items are 70% of Volume.

All this is gas fire. N.G. handled fire.

574a

May 25, 1965.

THE BORDEN COMPANY

CENTRAL DIVISION.

Price Quotation Data Covering

A & P Private Label Fluid

Milk Products in

A & P Areas No. 2, 3, 4, 5 & 6.

CX 15A

Schedule No. 1-Part 1

May 25, 1965.

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$4.3200
Market Administrator's Fee	.0200
Shrinkage	.0045
Procurement, Bulk Tank Premiums, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.5945
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$4.5245

Milk Cost By Items

Quarts 2.15 pounds X $4.5245 per cwt.	=	$.0973
Half Gallon 4.30 pounds X 4.5245 per cwt.	=	.1946
Gallon 8.60 pounds X 4.5245 per cwt.	=	.3891

18B

Schedule No. 1 - Part 2

May 25, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to Present Announced Super Pool Class 1 Price of $4.32)

	Net Price for A & P Private Label
Homo V. D. Milk - Gal. Paper	.6096
Homo V. D. Milk - 1/2 Gal. Paper	.3088
Homo V. D. Milk - Quart Paper	.1636
2% - 1/2 Gal. Paper	.2910
Vitamin Fortified Skim - 1/2 Gal. Paper	.2753
Half & Half - Pint Paper	.2401
Chocolate Milk - Quart Paper	.2156
Buttermilk - 1/2 Gal. Paper	.3084
Buttermilk - Quart Paper	.1636
Fortified Skim - Quart Paper	.1555
Whipping Cream - 1/2 Pint Paper	.2490

Prices apply to stores located in the geographical area subject to the terms of the Chicago Super Pool which includes Chesterton, South Bend, Mishawaka, Elkhart, Goshen, LaPorte, Valparaiso and Walkerton, all in the State of Indiana.

In the above listing we have not included certain items such as half and half quarts, sour cream, sour half and half, sour cream dips, tripie whip, yogurt, etc. Production of these items under private label adversely effects production costs substantially because the items are required in limited quantity.

18C

5

577d

Schedule No. 2 - Part 1.

May 25, 1965.

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$4.0000
Market Administrator's Fee	.0200
Shrinkage	.0043
Procurement, Bulk Tank Premium, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.2743
To 3.4% B. F. Finished Product	.0700
Cost of 3.4% Finished Product	$4.2043

MILK COSTS BY ITEMS

Quarts 2.15 pounds X $4.2043 per cwt. = $.0904

Half Gallon 4.30 pounds X 4.2043 per cwt. = .1808

Gallon 8.60 pounds X 4.2043 per cwt. = .3616

18D

52

Schedule No. 2 - Part 2
May 25, 1965

The Borden Company

General Quotation - A.P. Private Label

(Relative to Present Announced Superpools Class 1 Price of $4.00)

	Net Price for A.P. Private Label
Homo V.D. Milk Gals. Paper	.6960
Homo V.D. Milk 1/2 Gal. Paper	.3480
Homo V.D. Milk Quart Paper	.1839
2% - 1/2 Gal. Paper	.3242
Vitamin Fortified Skim - 1/2 Gal. Paper	.3199
Half & Half - Pint Paper	.2702
Chocolate Milk Quart Paper	.2344
Buttermilk 1/2 Gal. Paper	.3544
Buttermilk Quart Paper	.1829
Fortified Skim Quart Paper	.1695
Whipping Cream 1/2 Pint Paper	.2813

Prices apply to stores located in the geographical area subject to the terms of the Rockford Superpools which includes Lockport, Aurora, Joliet, Rockford, Freeport, and Love's Park, all in the State of Illinois.

In the above listing we have not included certain items such as half and half quarts, sour cream, sour half and half, sour cream dips, triple whip, yogourt, etc. Production of these items, under private label adversely affects production costs substantially because the items are in limited quantity.

18E

Schedule No. 3 - Part 1.

May 25, 1965.

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$3.7800
Market Administrator's Fee	.0200
Shrinkage	.0041
Procurement, Bulk Tank Premiums Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.0541
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$3.9841

MILK COSTS BY ITEMS

Quarts	2.15 pounds X $3.9841 per cwt. =	$.0857
Half Gallon	4.30 pounds X 3.9841 per cwt. =	.1713
Gallon	8.60 pounds X 3.9841 per cwt. =	.3426

18 F

Schedule No. 3 - Part 2

May 25, 1965

THE LORDEN COMPANY

General Quotation -- A & P Private Label

(Related to the Present Announced Class I Price Under Federal Order No. 30 of $3.78)

	Net Price for A & P Private Label
Homo V.D. Milk - Gal. Paper	$ .6396
Homo V.D. Milk - 1/2 Gal. Paper	.3323
Homo V.D. Milk - Quart Paper	.1732
2% - 1/2 Gal. Paper	.3044
Vitamin Fortified Skim Milk - 1/2 Gal. Paper	.2964
Half & Half - Pint Paper	.2575
Chocolate Milk - Quart Paper	.2222
Buttermilk - 1/2 Gal. Paper	.3371
Buttermilk - Quart Paper	.1762
Fortified Skim - Quart Paper	.1637
Whipping Cream - 1/2 Pint Paper	.2823

Prices apply to stores located in the geographical area subject to the announced Class I milk prices under Federal Order No. 30 and which Class I milk prices are not subject to producer "Superpool" payments. This area includes Woodstock, Belvidere, Pecotonica, Marengo, DeKalb, Rochelle, Dixon, Polo, Mt. Morris, Kankakee, Wilmington, Manteno, Momence, St. Annes, Gilman, LaSalle, Marseilles, Ottawa, Streator, Pontiac, Princeton, Spring Valley, Sandwich, Plano, Lacon and Minonk, all in the State of Illinois

18G

and Culver, Knox and North Judson in the State of Indiana.

In the above listing, we have not included certain items such as half & half quarts, sour cream, sour half & half, sour cream dips, triple whip, yogurt, etc. Production of these items under private label adversely affects production costs substantially because the items are in limited quantity.

Price Change Per Unit

(Related to the Federal Order No. 30 Announced Class I Price of $3.78 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	0067	.0134	.0268
.32	.0069	.0138	.0276

Price Change Per Unit

(Related to the Federal Order No. 30 Announced Class I Price of $3.78 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

Schedule No. 4 - Part 1.

May 25, 1965.

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$3.8800
Market Administrator's Fee	.0200
Milk Foundation and City Health Inspection Fee	.0200
Waste	.0040
Premiums	.1000
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.0240
To 3.4% B.F. Finished Product	.0720
Cost of 3.4% Finished Product	$3.9520

MILK COSTS BY ITEMS

Quarts 2.15 pounds X $3.9520	=	.0850
Half Gallon 4.30 pounds X 3.9520	=	.1699
Gallon 8.60 pounds X 3.9520	=	.3398

EXHIBIT 19
OBTAINED BY Brickley Osborne
ATTORNEY-EXAMINER
FILE NO. 6-71-0158
18 K 755

Schedule No. 4 - Part 2

May 25, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to the Present Announced Class 1 Price Under Federal Order No. 63 of $3.88)

	Net Price for A & P Private Label
Homo V. D. Milk - Gal. Paper	.5872
Homo V. D. Milk - 1/2 Gal. Paper	.2938
Homo V. D. Milk - Quart Paper	.1661
2% - 1/2 Gal. Paper	.2646
Vitamin Fortified Skim Milk - 1/2 Gal. Paper	.2531
Half and Half - Pint Paper	.2399
Chocolate Milk - Quart Paper	.1883
Buttermilk - 1/2 Gal. Paper	-
Buttermilk - Quart Paper	.1666
Fortified Skim - Quart Paper	.1523
Whipping Cream - 1/2 Pint Paper	.2671

Prices apply to stores located in the geographical area subject to the announced Class 1 Milk prices under Federal Order No. 63 and which Class 1 milk prices are not subject to producer "Super Pool" payments. This area includes Geneseo, Kewanee, Lombard, Moline, Mt. Carroll, Rock Island, Savannah, Sterling, Toulon and Galesburg, all in the State of Illinois and Clinton and Davenport, in the State of Iowa. In the above listing we have not included certain items such as half and half quarts, sour cream, sour half and half, sour cream dips, triple whip, yogurt, etc. Production of these items under private label adversely effects production costs substanfially because the items are in limited quantity.

Hearing EXHIBIT 20
OBTAINED 3/13/68
BY Richard A. Palermo
FILE NO. 671-0149

18 L 756

Schedule No. 4 - Part 3

May 25, 1965

Price Change Per Unit

(Related to the Federal Order No. 63 Announced Class I Price of $3.38 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

13.19

Schedule No. 1 - Part 3
Sheet 2

May 25, 1965

Price Change Per Unit

(Related to the Federal Order No. 63 Announced Class I Price of $3.88 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

IPN

18 C

Schedule No. 5

May 25, 1948

Composite Borden Gross Profit per Quart

Item	Weekly Quarts	Borden Gross Profit per Quart	Total
Quarts	6,659	$ .0122	$ 81.64
Half Gallons	47,416	.0006	27.37
Gallon	29,140	(.0011)	(32.12)
Total	83,215	$ .0009	$ 76.89

Analysis of Borden Gross Profit per Quart per Above

	per Quart	per Half-Gallon	per Gallon
Raw Milk Cost	$.0883	$ .1796	$.3551
Container Cost	.0135	.0342	.0684
Production Expense	.0200	.0400	.0800
(A) Route Dely. Expense (man and truck)	.0186	.0374	.0691
(B) Other Distribution Exp.	.0125	.0250	.0500
Total Cost	$.1579	$ .3162	$.6226
Average quotation for A & P Private Label	.1701	.3173	.6181
Borden Gross Profit per Unit	$.0122	$ .0011	$(.0045)

(A) Prices are based upon route delivery expense which considers modified drop delivery service with deliveries on a 3-day-per-week basis. In some areas it is recognized that facilities still require 6-day-per-week service. Deliveries are store door -- no instore service, no special deliveries, and no returns except for products inferior in quality and packaging at the time of delivery.

5-D

(D) Includes truck loading, weekly billing, waste and general overhead.

Prices are subject to change in accordance with Schedules 1, 2, 3 and 4 Part 3 "Price Change per Unit" covering changes up or down in the Class I Milk Price or the Superpool Price as such applies covering raw product costs. It is also considered that price changes in the cost of containers and labor rate changes will be properly reflected mutually when such occur.

In certain areas the primary basic price has recognized the depressed competitive situation prevailing in such markets. Such situations must eventually be corrected. It is considered that any economic improvement that occurs subsequently will be mutually recognized in accordance with the situations.

18 P

May 26, 1965

FILE MEMO

Gordon Tarr, accompanied by Joe Malone, met with Elmer Schmidt at A & P's Chicago offices at 1:30 P.M. to present price quotations in respect to A & P private label fluid milk products sold in A & P Areas 2, 3, 4, 5 and 6.

Tarr reviewed with Schmidt their prior discussions in regard to the subject, touching on the many complexities of the market areas and the price patterns existing as compared to a solid single market as represented by A & P's Area No. 1. Tarr further referred to the private label differential, also previously discussed, of 1/2 cent on quarts, 1 cent on half gallons and 2 cents on gallons.

Schmidt then expressed his thoughts in regard to a price differential by one dealer which set forth the 1/2 cent on quarts, 1 cent on half gallons and 2 cents on gallons. This price differential structure he posed would then be established by dealer #2 who wanted some of the private label business and then by dealer #3 and so on. This he visioned would and could cause the Federal Trade Commission real concern.

We then discussed in general terms the aspects of the meeting of competition, the cost proof developed in connection with our Wisconsin private label matter, the inquiries made previously by F.T.C. in regard to private label milk, and our Iowa data in respect thereto and Schmidt appeared rather satisfied with this review.

Schmidt then talked about the New York and Kansas City markets and wrote a figure on his pad which looked like 2.09. He indicated that it appeared difficult to understand that if such a differential was possible in those markets,

why were the economics different in the areas under review which had previously been discussed at the 1/2 - 1 - 2 level.

It was pointed out to Schmidt that the markets he referred to were what could be referred to as single solid markets, each of which had a complement of similar dealers, having similar union contracts; were subject to the same producer prices for raw milk, methods of delivery were similar and competitive pricing practices were generally related to such conditions. This Schmidt was advised represented the Chicago market pattern, in which case we were quick to point out that the private label quotes were solidly in the differential price area he referred to previously. It was strongly made clear that we had made this level of differential available to A & P in our Chicago-Calumet quote, that he was talking about a solid geographical and population market and that our Chicago-Calumet position was entirely consistent with his theories concerning New York and Kansas City.

Time was then taken to point out the extreme distinction between the markets contained in A & P Areas 2, 3, 4, 5 and 6.

a) That the geographical area was widespread.

b) That the area was composed of many cities and towns, each of which was a market in itself.

c) That each market had its own local dealers.

d) That depending on the area, many different union contracts were in effect which regulated not only hours of work and rates of pay but also some had restrictive delivery conditions.

e) That some areas were already affected by depressed prices which factor had already been recognized in the prevailing prices in such areas for the Borden label.

f) That a greater percentage of smaller volume stores operate in Areas 2, 3, 4, 5 and 6 and that the location of stores and

f) continued -- the distance travelled substantially affect delivery costs per unit.

g) That in Areas 2, 3, 4, 5 and 6 delivery is effected by almost every kind of distribution facility --

(1) Company commission routes.
(2) Company hourly-rated routes.
(3) Company trailer drop-off routes.
(4) Vendors and distributors.
(5) Over-the-road contract carriers.

h) That in Areas 2, 3, 4, 5 and 6 there were basic differences in raw product costs which materially affected the total cost involved.

i) That all these factors had to be considered in their own economic and competitive lights, that they contributed toward a cost and delivery complex which differed greatly from serving a single market.

Schmidt appeared to be receptive to the factors presented and discussed; and after some general remarks, Tarr presented Schmidt with a copy of data: "Price Quotation Data Covering A & P Private Label Fluid Milk Products in A & P Areas No. 2, 3, 4, 5 and 6."

It was indicated that before any review of the material presented took place it might be advisable to look at the various considerations that tended to dictate the price quotations set forth.

a) A & P sales areas 2, 3, 4, 5 and 6 cover a wide geographical area extending west from South Bend, Indiana (exclusive of the Calumet Area which is a part of A & P Area No. 1) to the Quad-City Area, north to the Wisconsin state line and east to Lake Michigan (exclusive of the Chicago area which is a part of A & P Area No. 1).

b) Analysis of the producer price for raw milk covering sales made in this wide area disclosed four (4) separate important raw milk cost bases as follows:

(1) The negotiated Chicago Superpool price of $4.32 per cwt. for Class I milk testing 3.5% butterfat.

b) (2) The negotiated Rockford Superpool price of $4.00 per cwt. for Class I milk testing 3.5% butterfat.

(3) The Chicago Federal Order Class I price as announced by the Market Administrator for Federal Order No. 30 of $3.78 per cwt. for Class I milk testing 3.5% butterfat (April-1965).

(4) The Quad-City Federal Order Class I price for Federal Order No. 63 of $3.88 per cwt. for Class I milk testing 3.5% butterfat (April-1965).

c) Analysis of the delivery and distribution procedures and methods in the various distinct markets disclosed a wide range of delivery costs (man and truck) due to type of delivery; whether drop, 3-day, 4-day, 5-day, or conventional full service 6-day; delivery through vendors and distributors, delivery effected through over-the-road contract carriers, delivery effected through trailer drop-off runs, base pay plus commissions, commissions entirely as the basis of compensation, hourly-rated drivers as well as differences in so-called fringe benefits representing vacations, pensions, health and welfare, payroll taxes, etc.

In this cost area, a determination was made of each of the respective delivery and distribution costs involved.

d) In the quotation previously submitted covering Area 1 - Chicago-Calumet Area - costs relative to container costs, production expense and other distribution expense were set forth in detail and these respective costs were included in the quotation herein presented at the same levels as the same cost factors existed in these cost areas.

We then indicated that in attempting to provide a price quotation that would be representative of the different economic factors involved, it was the decision to base such quotations on areas patterned after the raw milk costs, such cost area representing the largest single cost element.

Therefore, four (4) price quotation areas were set forth. In each area a Schedule 1, shown separately as Part 1, Part 2, Part 3 and Part 4 was developed which sets forth the calculation of raw milk costs.

Likewise, in each area a Schedule 2, Part 1, Part 2, Part 3 and Part 4 was developed. These schedules disclose the price quotation for private label products covering eleven (11) items and such schedules set forth by city and town name the areas where such price quotations were applicable.

Schedule 3, Part 1, Part 2, Part 3 and Part 4 is a formula schedule which sets forth the price changes that would occur where raw product costs vary from the per hundred costs as indicated on Schedules No. 1.

A review of the price quotations in each respective area was made with little comment from Schmidt.

It was then pointed out to Schmidt that throughout his discussions with Tarr that it was a requirement that the price quotations submitted be related to costs and Schedule 5 "Borden Gross Profit Per Quart" was developed to disclose costs and resulting gross profit to Borden. Schmidt was advised that it was our considered judgment from his prior discussions with Tarr that he was interested in the overall price quotation covering A & P Areas 2, 3, 4, 5 and 6 as related to the overall total costs involved and a resulting gross profit to Borden and he agreed this approach met his requirement.

Schedule 5 "Borden Gross Profit Per Quart" was reviewed in detail, covering again the various elements of costs, their cause and the differences between markets. Attention was also called to the fact that the price quotations also included recognition of depressed competitive markets where such existed. It was clearly pointed out to Schmidt that based on the price quotations submitted and the various elements shown in detail Borden's gross profit per quart was only 9/10 of a mill or slightly above a break even point.

Schmidt appeared amazed and appeared shocked at this result and, in a general way, inquired "why." It was indicated that this was our election (Borden's), that we presently enjoyed the business and desired to retain same, did not want outside bids if possible and that it was our responsibility to find the ways and means through greater efficiencies to improve this profit level. He appeared to recognize our philosophy and seemed to recognize also that these quotations represented a bottom line.

Schmidt inquired as to our thoughts about their approach that price quotations be related to costs. It was indicated that, in our opinion, this approach was basically a sound one but one that was not generally practiced in the fluid milk business. In the general discussion of this phase, it was pointed out that historically the fluid milk business was a local small dealer type of business. Each separate market had its local dealers who were subject to local wage rates and producer milk prices. Product items were priced generally not in relation to costs but in relation to other competitors and, in many cases, to a cost appraisal which only recognized out-of-pocket elements of costs.

Schmidt expressed an interesting factor -- he hoped this private label program might be productive of $500,000 annually which was the gross annual contribution of approximately ten (10) good-sized stores. In this regard, it was stressed that this type of product contribution could only result from the continuance of present out-of-store margins on fluid milk products and that recognition of the competitive situation developed in Wisconsin with the introduction of private label products was important in any valuation made by A & F.

Schmidt made inquiry as to the term of Chicago superpool raw product costs and how such prices were arrived. The factors leading up to the superpool price determination were reviewed step by step, setting forth the negotiation process involved and indicating that the superpool price would remain fixed during the remainder of the year unless the producer bargaining group requested a renegotiation of the issue. In which case, a 30-day notice was required. It was pointed out to Schmidt that the producer original demand embraced a $4.77 price, relating same to a $5.00 per cwt. superpool price which is in effect in the Detroit market. This brought a general discussion of various producer pay prices and a review of Department of Agriculture data published in the Department's "Fluid Milk Report." Schmidt seemed appreciative of this general review of the economics involved, and as such factors related to deficit markets, surplus markets, etc.

Conversation covering grocery retailing and our business occurred particularly as related to automation and improved material handling techniques. We pointed to the study report of the Super Market Institute covering the cost savings to super market operators where it was possible to receive merchandise in pallet loads. In this regard, we made it a point to emphasize the fact that our new Woodstock Plant was one of the few milk plants in the country designed to handle the movement of merchandise by pallets.

Schmidt then requested of Tarr that he develop the overall effect of such prices as related to A & P's volume in Areas 2, 3, 4, 5, 6 and 7. The use of a three (3) week period was mutually agreed to establish a reasonable base for such computation.

Before leaving, Tarr reminded Schmidt that the base Class I price used of $1.29 per cwt. in the price quotation covering the Chicago-Calumet quote was now $4.32 per cwt. due to the recently negotiated superpool price and, therefore, this 3-cent per cwt. increase would affect the price quotations in accordance with the formula schedule submitted as a part of the quotation.

Schmidt then invited us for coffee and, upon leaving, he indicated "this has been a very fine meeting" further indicating he hoped we would get together again some time in the future.

Revised
July 26, 1965.

THE BORDEN COMPANY

CENTRAL DIVISION.

Price Quotation Data Covering

A & P Private Label Fluid

Milk Products in

A & P Areas No. 2, 3, 4, 5 & 6.

CX. 21 A

Schedule No. 1 - Part 1

Revised
July 26, 1965.

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$4.3200
Market Administrator's Fee	.0200
Shrinkage	.0045
Procurement, Bulk Tank Premiums, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.5945
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$4.5245

MILK COST BY ITEMS

Quarts 2.15 pounds X $4.5245 per cwt.	= $.0973
Half Gallons 4.30 pounds X 4.5245 per cwt.	= .1946
Gallons 8.60 pounds X 4.5245 per cwt.	= .3891

Schedule No. 1 - Part 2

Revised July 26, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to Present Announced Superpool Class I Price of $4.32 Per CWT.)

Private Label Products	Net Price for A & P Private Label Products by Type and Method of Delivery			
	3-Day Per Wk. Drop Delv'y.	4-Day Per Wk. Drop Delv'y.	5-Day Per Wk. Drop Delv'y.	6-Day Per Wk. Convent'l. Delivery
Homo V.D. Milk - Gal. Paper	$.6090	$.6440	$.6540	$.6640
Homo V.D. Milk - 1/2 Gal. Paper	.3080	.3255	.3305	.3355
Homo V.D. Milk - Quart Paper	.1630	.1700	.1730	.1760
2% - 1/2 Gal. Paper	.2800	.2935	.2985	.3035
Vitamin Fortified Skim - 1/2 Gal. Paper	.2600	.2685	.2735	.2785
Vitamin Fortified Skim - Quart Paper	.1555	.1648	.1678	.1708
Half & Half - Pint Paper	.2390	.2420	.2450	.2480
Chocolate Milk - Quart Paper	.2156	.2456	.2486	.2516
Buttermilk - 1/2 Gal. Paper	.3084	.3289	.3339	.3389
Buttermilk - Quart Paper	.1550	.1620	.1650	.1680
Whipping Cream - 1/2 Pint Paper	.2490	.2660	.2690	.2720

Prices apply to stores located in the geographical area subject to the terms of the Chicago Super Pool which are as follows:

Stores Receiving 3-Day Per Week Delivery:

South Bend (6 stores), Mishawaka, Elkhart, Goshen, La Porte, Valpariso, Walkerton and Michigan City.

Stores Receiving 6-Day Per Week Delivery:

Chesterton, South Bend (1 store).

Stores Receiving 4-Day and 5-Day Per Week Delivery:

None

21C

Drop Delivery recognizes store door deliveries - no in-store service; no special deliveries and no returns except products inferior in quality and packaging at time of delivery.

Conventional Delivery recognizes full service delivery; no special deliveries and no returns except products inferior in quality and packaging at time of delivery.

Schedule No. 1 - Part 3

Revised July 26, 1965

Price Change Per Unit

(Related to the Present Announced Chicago Super Pool Class I Price of $4.32 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

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Schedule No. 1 - Part 3
Page 2

Revised July 26, 1965

Price Change Per Unit

(Related to the Present Announced Chicago Super Pool Class I Price of $4.32 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

21 F

Schedule No. 2 - Part 1.

Revised
July 26, 1965.

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$4.0000
Market Administrator's Fee	.0200
Shrinkage	.0043
Procurement, Bulk Tank Premium, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.2743
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$4.2043

MILK COSTS BY ITEMS

Quarts 2.15 pounds X $4.2043 per cwt.	= $.0904
Half Gallons 4.30 pounds X 4.2043 per cwt.	= .1808
Gallons 8.60 pounds X 4.2043 per cwt.	= .3616

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Schedule No. 2 - Part 2

Revised July 26, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to Present Announced Superpool Class I Price of $4.00 Per CWT.)

Private Label Products	Net Price for A & P Private Label Products by Type and Method of Delivery			
	3-Day Per Wk. Drop Delv'y.	4-Day Per Wk. Drop Delv'y.	5-Day Per Wk. Drop Delv'y.	6-Day Per Wk. Convent'l. Delivery
Homo V.D. Milk - Gal. Paper	$.6410	$.6760	$.6860	$.6960
Homo V.D. Milk - 1/2 Gal. Paper	.3205	.3380	.3430	.3480
Homo V.D. Milk - Quart Paper	.1680	.1750	.1780	.1810
2% - 1/2 Gal. Paper	.2995	.3130	.3180	.3230
Vitamin Fortified Skim - 1/2 Gal. Paper	.2895	.2980	.3030	.3080
Vitamin Fortified Skim - Quart Paper	.1542	.1635	.1665	.1695
Half & Half - Pint Paper	.2480	.2510	.2540	.2570
Chocolate Milk - Quart Paper	.1970	.2270	.2300	.2330
Buttermilk - 1/2 Gal. Paper	.3239	.3444	.3494	.3544
Buttermilk - Quart Paper	.1680	.1750	.1780	.1810
Whipping Cream - 1/2 Pint Paper	.2583	.2753	.2783	.2813

Prices apply to stores located in the geographical area subject to the terms of the Rockford Superpool which are as follows:

Stores Receiving 6-Day Per Week Delivery:

Lockport, Aurora (2 stores), Joliet (6 stores), Rockford (5 stores), Freeport and Loves Park.

Stores Receiving 3-Day - 4-Day - or 5-Day Per Week Delivery:

None

Drop Delivery recognizes store door deliveries - no in-store service; no special deliveries and no returns except products inferior in quality and packaging at time of delivery.

Conventional Delivery recognizes full service delivery; no special deliveries and no returns except products inferior in quality and packaging at time of delivery.

Schedule No. 2 - Part 3

Revised July 26, 1965

Price Change Per Unit

(Related to the Present Announced Rockford Super Pool Class I Price of $4.00 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

Revised July 26, 1965

Price Change Per Unit

(Related to the Present Announced Rockford Super Pool Class I Price of $4.00 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

Schedule No. 3 - Part 1.

Revised
July 26, 1965.

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$3.7800
Market Administrator's Fee	.0200
Shrinkage	.0041
Procurement, Bulk Tank Premiums, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.0541
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$3.9841

MILK COSTS BY ITEMS

Quarts 2.15 pounds X $3.9841 per cwt.	= $.0857
Half Gallons 4.30 pounds X 3.9841 per cwt.	= .1713
Gallons 8.60 pounds X 3.9841 per cwt.	= .3426

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Schedule No. 3 - Part 2

Revised July 26, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to the Announced Class I Price Under Federal Order No. 30 of $3.78 Per CWT.)

Private Label Products	Net Price for A & P Private Label Products by Type and Method of Delivery			
	3-Day Per Wk. Drop Delv'y.	4-Day Per Wk. Drop Delv'y.	5-Day Per Wk. Drop Delv'y.	6-Day Per Wk. Drop Delivery
Homo V.D. Milk - Gal. Paper	$.6216	$.6566	$.6666	$.6766
Homo V.D. Milk - 1/2 Gal. Paper	.3108	.3283	.3333	.3383
Homo V.D. Milk - Quart Paper	.1644	.1714	.1744	.1774
2% - 1/2 Gal. Paper	.2898	.3033	.3083	.3133
Vitamin Fortified Skim - 1/2 Gal. Paper	.2798	.2883	.2933	.2983
Vitamin Fortified Skim - Quart Paper	.1474	.1567	.1597	.1627
Half & Half - Pint Paper	.2414	.2444	.2474	.2504
Chocolate Milk - Quart Paper	.1934	.2234	.2264	.2294
Buttermilk - 1/2 Gal. Paper	.3078	.3283	.3333	.3383
Buttermilk - Quart Paper	.1644	.1714	.1744	.1774
Whipping Cream - 1/2 Pint Paper	.2484	.2654	.2684	.2714

Prices apply to stores located in the geographical area subject to the announced Class I milk prices under Federal Order No. 30, (which Class I milk prices are not subject to producer "superpool" payments) which stores are as follows:

Stores Receiving 3-Day Per Week Delivery:

Manteno	Momence	St. Annes	Gilman	La Salle
Marseilles	Ottawa	Streator	Pontiac	Princeton
Spring Valley	Sandwich	Plano	Lacon	Minonk
Culver	Knox	North Judson	Galena	Warren

Stores Receiving 4-Day Per Week Delivery:

None

Stores Receiving 5-Day Per Week Delivery:

Belvidere	Marengo	DeKalb
Rochelle	Polo	Mt. Morris
Dixon		

Stores Receiving 6-Day Per Week Delivery:

Woodstock	McHenry
Fox Lake	Antioch
Kankakee (2 stores)	Wauconda
Pecatonica	Crystal Lake
Wilmington	Zion

Drop Delivery recognizes store door deliveries - no in-store service; no special deliveries and no returns except products inferior in quality and packaging at time of delivery.

Conventional Delivery recognizes full service delivery; no special deliveries and no returns except products inferior in quality and packaging at time of delivery.

Schedule No. 3 - Part 3

Revised July 26, 1965

Price Change Per Unit

(Related to the Federal Order No. 30 Announced Class I Price of $3.78 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

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Schedule No. 3 - Part 3
Page 2

Revised July 26, 1965

Price Change Per Unit

(Related to the Federal Order No. 30 Announced Class I Price of $3.78 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

21 P

Schedule No. 4 - Part 1.

Revised
July 26, 1965.

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$3.8800
Market Administrator's Fee	.0200
Milk Foundation and City Health Inspection Fee	.0200
Waste	.0040
Premiums	.1000
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.0240
To 3.4% B.F. Finished Product	.0720
Cost of 3.4% Finished Product	$3.9520

MILK COSTS BY ITEMS

Quarts	2.15 pounds X $3.9520	= $.0850
Half Gallons	4.30 pounds X 3.9520	= .1699
Gallons	8.60 pounds X 3.9520	= .3398

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Schedule No. 4 - Part 2

Revised July 26, 1965

The Borden Company

General Quotation - A & P Private Label

Related to the Announced Class I Price Under Federal Order No.63 of $3.88 per cwt.

Net Price for A & P Private Label Product: by Type and Method of Delivery

Private Label Products	3-Day Per Wk. Drop Delv'y.	4-Day Per Wk. Drop Delv'y.	5-Day Per Wk. Drop Delv'y.	6-Day Per Wk. Convent'l. Delivery
Homo V. D. Milk - Cal. Paper	.5872	.6222	.6322	.6422
Homo V. D. Milk - 1/2 Gal. Paper	.2938	.3113	.3163	.3213
Homo V. D. Milk - Quart Paper	.1661	.1731	.1761	.1791
2% - 1/2 Cal. Paper	.2646	.2781	.2831	.2881
Vitamin Fortified Skim Milk-1/2 Gal. Paper	.2531	.2616	.2666	.2716
Vitamin Fortified Skim " Qt.-Paper	.1523	.1616	.1646	.1676
Half and Half - Pint Paper	.2399	.2429	.2459	.2489
Chocolate Milk - Quart Paper	.1883	.2183	.2213	.2243
Buttermilk - Quart Paper	.1666	.1736	.1766	.1796
Whipping Cream - 1/2 Pint Paper	.2671	.2841	.2871	.2901

Prices apply to stores in the geographical area subject to the announced Class I Milk prices under Federal Order No. 63, (which Class I Milk prices are not subject to producer "Super Pool" payments) which stores are as follows:

Stores Receiving 3 Day Per Week Delivery

Geneseo Kewanee Lanark Moline (2 Stores)
Mt. Carroll Rock Island Savannah Sterling
Toulon Galesburg (2 Stores) Clinton Davenport (2 Stores)

Stores Receiving 4 Day, 5 Day or 6 Day Delivery

None.

Drop Delivery recognizes store-door deliveries - no in-store service; no special deliveries and no returns except products inferior in quality and packaging at the time of delivery.

Conventional Delivery recognizes full service delivery; no special deliveries and no returns, except products inferior in quality and packaging at time of delivery.

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Schedule No. 4 - Part 3

Revised July 26, 1965

Price Change Per Unit

(Related to the Federal Order No. 63 Announced Class I Price of $3.88 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01			
.02	.0002	.0004	.0008
.03	.0004	.0008	.0016
.04	.0007	.0014	.0028
.05	.0009	.0018	.0036
.06	.0010	.0020	.0040
.07	.0013	.0026	.0052
.08	.0015	.0030	.0060
.09	.0017	.0034	.0068
.10	.0019	.0038	.0076
.11	.0021	.0042	.0084
.12	.0024	.0048	.0096
.13	.0026	.0052	.0104
.14	.0028	.0056	.0112
.15	.0030	.0060	.0120
.16	.0033	.0066	.0132
.17	.0035	.0070	.0140
.18	.0037	.0074	.0148
.19	.0039	.0078	.0156
.20	.0041	.0082	.0164
.21	.0043	.0086	.0172
.22	.0045	.0090	.0180
.23	.0048	.0096	.0192
.24	.0050	.0100	.0200
.25	.0052	.0104	.0208
.26	.0054	.0108	.0216
.27	.0056	.0112	.0224
.28	.0059	.0118	.0236
.29	.0061	.0122	.0244
.30	.0063	.0126	.0252
.31	.0065	.0130	.0260
.32	.0067	.0134	.0268
	.0069	.0138	.0276

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Revised July 26, 1965

Price Change Per Unit

(Related to the Federal Order No. 63 Announced Class I Price of $3.88 per CWT.)

Increase or Decrease Per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

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Schedule No. 5

Revised July 26, 1965

Composite Borden Gross Profit
Per Quart - Per Schedules 1,2,3 & 4 - Part 2

Item	Total Weekly Sales Units	Weekly Sales Units Converted to Quarts	Borden Gross Profit Per Quart	Total
Quarts _ Paper	7,520	7,520	$ .0111	$ 83.47
Half Gallons "	29,314	58,628	.0020	117.26
Gallons "	8,243	32,972	(.0003)	(9.89)
Total	-	99,120	.0019	$190.84

Analysis of Borden Gross Profit
Per Quart Set Forth Above

Item	Per Quart	Per Half Gallon	Per Gallon
Raw Milk Cost	$ .0888	$ .1793	$ .3564
Container Cost	.0185	.0342	.0684
Production Expense	.0200	.0400	.0800
Route Del'y. " (A) (man & truck)	.0186	.0382	.0712
Other Distribution Exp. (B)	.0125	.0250	.0500
Total Cost	$ .1584	$ .3167	$ .6260
Average Quotation For A & P Private Label (C)	$ .1695	$ .3206	$ .6247
Borden Gross Profit Per Unit	$ .0111	$ .0039	$(.0013)
Borden Gross Profit Per Quart	$ .0111	$ .0020	$(.0003)

(A) Represents average weighted cost based upon the type of service currently required.

(B) Includes truck loading, weekly billing, waste and general overhead.

(C) Prices are subject to change in accordance with Schedules 1,2,3 and 4, Part 3 "Price Changes Per Unit" covering changes up or down in the Class I Milk Price or the Super Pool Price as such applies covering raw product costs.

Any changes in our costs, up or down, in labor, containers, fuel, power, etc. are not covered in our pricing formula and will require consideration as they occur.

Re: Chicago Quotation on A & P Private Label Milk in the Chicago-Calumet Area

Reference has been made to the fact that the container and departmental costs submitted and shown in detail under date of February 9, 1965, on schedule "Basic Caluculation and Private Label Quotation Schedule for Quarts, Half Gallons and Gallons" covering A & P private label milk are substantially above similar costs in Metropolitan New York market.

The costs elements which were shown on such schedule embraced the following:

	Per Quart Container	Per Half Gallon Container	Per Gallon Container
Container Costs	$ .0185	$ .0342	$ .0684
Production Expense	.0200	.0400	.0800
Route Delivery Expense	.0225	.0450	.0900
Other Distribution Expense	.0125	.0250	.0500
Total Container and Departmental Costs	$ .0735	$ .1442	$ .2884

This cost data was based on the elements of cost related to the production and delivery of fluid milk products in the Metropolitan Chicago area.

In this market area, the above costs involved other than container cost, are principally salaries and wages, which element of cost is subject to the provisions of local union labor contracts negotiated on an Industry-wide basis with the Milk Wagon Drivers Union, Local 753 and Dairy Employees Union, Local 754. These contract agreements not only provide for rates of pay and commissions but also cover hours and conditions of work.

Examination of similar costs covering the Metropolitan New York operation which were submitted in connection with the New York quotation

covering A & P private label milk in August, 1964 disclosed the following:

	Per Quart Container	Per Half Gallon Container	Per Gallon Container
Container Cost	$ .0200	$ .0330	$ .0650
Processing Charge	.0200	.0400	.0800
Delivery Charge	.0200	.0400	.0700
Total	$ .0600	$ .1130	$ .2150

Comparing the above costs with the Chicago data discloses that the Chicago container and departmental costs exceed the New York cost data as follows:

	Increased or (Decreased) Unit Cost		
	Per Quart Container	Per Half Gallon Container	Per Gallon Container
Container Cost	$(.0015)	$ .0012	$ .0034
Production Expense	-	-	-
Route Delivery Expense	.0025	.0050	.0100
Other Distribution Expense	.0125	.0250	.0500
Total	$ .0135	$ .0312	$ .0634

From the above, it is quickly ascertainable that the principal area of cost difference is related to route delivery and other distribution expense.

Aside from the raw milk cost, this cost area is second in cost importance; but in a cost comparison analysis, recognition is required of any cost impact resulting from union contract wage rates, delivery restrictions and local health limitations. Reference will be made to these distinctions in detail.

Examination was made as to the elements of cost that were contained in the total delivery unit cost by the Metropolitan New York operation and by

the Metropolitan Chicago operation covering A & P private label milk in the Chicago-Calumet area.

This review disclosed that the total Chicago unit cost covering Route Delivery Expense and Other Distribution Expense included the cost covering the movement of milk from its plant at Woodstock, Illinois, to Chicago, Illinois, a distance of 51 miles, while in the New York operation this cost was considered to be a part of the milk cost.

To provide comparability of cost comparison, this cost which amounts to 35.29 cents per hundred pounds, or $.0076 per point, was reclassified as a part of the Chicago milk cost. This reclassification of cost when added to the former cost of procurement, bulk tank premiums, association fees, inner zone premiums, etc., becomes 60.29 cents a hundred pounds which is comparable to the New York cost for similar type functions of 70 cents per hundred pounds. Schedule No. I attached hereto sets forth the details in connection with the formula price for raw milk covering both markets.

Delivery and Distribution Expense

The reclassification of the transport expense results in the following revised per unit cost covering route delivery expense and other distribution expense as follows:

	Per Quart	Per Half Gallon	Per Gallon
Route Delivery Expense	$ .0225	$ .0450	$ .0900
Other Distribution Expense	.0049	.0098	.0196
Total	$ .0274	$ .0548	$ .1096

The above delivery and distribution expense per unit as revised compares with the New York "delivery charge" as follows:

	Per Quart	Per Half Gallon	Per Gallon
Delivery Charge	$ .0200	$ .0400	$ .0700
Increased Cost Per Unit of Chicago over New York	$ .0074	$ .0148	$ .0396

Before due weight and consideration can be given to the indicated delivery and distribution cost differences between the two markets, recognition is necessary of factors that are basically different and thus create cost differentials which are wholly unrelated to operational efficiency.

(1) Both operations have in effect negotiated union labor contracts which govern rates of pay, hours of work, and method of delivery.

(2) The rate of pay and commission of a wholesale route driver in New York is substantially below that of Chicago. In New York the base pay per week is $44.15 less and the commission cost per week based on Chicago's route loads is $83.91 per week less.

(3) Both operations make deliveries on a 6-day basis to stores. However, in New York the Dairy Sealed delivery is geared to a street drop delivery (even before the store opens). In Chicago the union contract specifically provides under Article 39B: "It is agreed that no relays of merchandise shall be made on store wholesale routes to trucks or stores at any time. All deliveries

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shall be made into the dairy case or cooler by the driver without any help or assistance." While Chicago has been able to modify its delivery method compared to the restrictive provision of the union contract, the extent of such modification is limited.

(4) In New York the drop delivery method considers the sidewalk drop of merchandise even before the stores open, returning later to have the ticket signed and to pick up empty cases. This type of drop delivery in Chicago would not be allowed by the Chicago Health Department.

(5) In New York, peak day requirements are handled by a "shuttle" service which implements into service a total of approximately ten vehicles, using both regular inside and outside personnel in its program. In Chicago the union contract limits this treatment and under no condition could "inside" union employees be used for an "outside" function. In Chicago inside and outside employees are represented by separate and distinct unions.

(6) The average purchase per store per day in New York represents 752 points compared to 547 points per delivery in Chicago. This is an important factor in delivery cost evaluation.

(7) There is a greater density of stores in the New York area which allows for less driving time and a greater application of more direct time in the delivery function.

The foregoing attempts to set forth some of the operational differences between the wholesale delivery operations in the two respective markets, all of which contribute to cost differences.

Schedule No. 2 attached is a comparison of the delivery and distribution costs between the two markets. This data discloses that it costs .0083 more to perform the wholesale delivery requirement in Chicago than New York. This comparison considers only prime basic delivery and distribution expenses as set forth and is completely devoid of any overhead and burden costs.

This delivery cost differential of .0083 per point is the equivalent of .0166 per half gallon and .0332 per gallon.

Schedule No. 3 sets forth the detailed per unit costs included in the New York quotation of September 3, 1964, and the Chicago-Calumet quotation of February 9, 1965. This schedule shows that after putting such costs on a comparable basis between the two markets that the difference in Chicago's per unit costs is entirely justified.

To summarize, the total container and departmental cost increase per the quotation is as follows:

Per Quart	Per Half Gallon	Per Gallon	Weighted Average Per Qt.
$ .0059	$ .0160	$ .0430	$ .0082

The actual delivery and distribution cost increase as disclosed by Schedule No. 2 is as follows:

Per Quart	Per Half Gallon	Per Gallon	Weighted Average Per Qt.
$ .0083	$ .0166	$ .0332	$ .0083

The facts more than support the wholesale delivery and distribution differential.

Container Costs

A comparison of the container costs which were a part of New York's bid quotation of September 3, 1964, and the Chicago-Calumet quotation of February 9, 1965, discloses the following:

	Unit Cost Per Container		
	Quart Size	Half Gallon Size	Gallon Size
New York	$ .0200	$ .0329	$ .0650
Chicago-Calumet	.0185	.0342	.0684
Increase or (Decrease) Chicago over New York	(.0015)	.0013	.0034

Applying the above indicated container cost units to the volume in each market by container size, the average weighted cost per quart is as follows:

New York	$ .01734
Chicago	.01728

In this regard, it is important to recognize that container costs do not just represent the milk carton alone. This cost includes, in addition to the carton, the cost of the forming machine rental, production royalties, the cost of shipping cases and case container covers, all of which costs are variable in nature between plants.

Summary of Gross Margin to Borden as Revised (Not Including Overhead and Burden)

Schedule No. 4 is a revision of schedule "Basic Calculation and Private Label Quotation Schedule for Quarts, Half Gallons and Gallons" which was attached to the quotation of February 9, 1965.

This revised schedule discloses that the Borden gross margin (before overhead and burden) per quart (quarts, half gallons and gallons converted to a quart basis) to be $.0036 per point.

Comparison of Selling Price

Schedule No. 5 sets forth a comparison of the present private label prices in New York adjusted for the difference in the base Class I price of $1.07 per cwt. with the Chicago-Calumet quotation.

This schedule discloses the following:

	Quart Paper	Half Gallon Paper	Gallon Paper
Selling Prices in New York Adjusted for Class I Price Differential	$ .1748	$ .3453	$ .6797
Selling Prices Per the Chicago-Calumet Quotation	.1855	.3430	.6860
Excess of Chicago-Calumet Bid Quotation over Metropolitan New York Selling Prices as Adjusted	$ .0107	$(.0023)	$ .0063

Applying the increased and decreased price factors as shown above to the total quart, half gallon, and gallon volume considered in the Chicago-Calumet bid, these increased and decreased selling prices weighted on a per quart basis (quarts, half gallons and gallons converted to quarts) result in a weighted average per quart of only 9 tenths of a mill above the present New York selling prices for homogenized milk.

The foregoing attempts to set forth the data and supporting facts to justify the economic relationship of the Chicago-Calumet bid quotation with the accepted selling prices in effect in the Metropolitan New York market.

It is evident from the material examined and the cost factors analyzed that the selling prices quoted are realistic from a minimum cost standpoint and are devoid of overhead and burden cost elements.

Schedule No. 1

THE BORDEN COMPANY
CENTRAL DIVISION

BASIC CALCULATION OF RAW PRODUCT COST - CLASS I MILK

Formula Price for Raw Milk - Chicago-Calumet Revised by a Reclassification of Costs on a Comparable Basis with the New York Formula

BORDEN'S FORMULA FOR DETERMINING MILK COST FOR A & P LABEL MILK CONTAINERS - NEW YORK MARKET (Costs Based on August 1964 Class I Prices)	Price Per Hundred Pounds
(A) Class I Price for 3.5% butterfat milk as announced by the Federal Milk Market Administrator under terms of Federal Milk Marketing Order No. 2	$ 5.21
Market Administrator's Fee	.02
(B) Butterfat to 3.6%	.04
Country plant receiving, bulk farm tank pick-up allowances, farm inspection, supervision of country laboratory testing, etc., and hauling in bulk tanks to city plants	.70
Shrinkage 1%	.06
Total Cost of Milk at City Plants	$ 6.03
$.0603 x 2.15 lbs. = Cost per Quart	.1296
Cost per Half-Gallon	.2592
Cost per Gallon	.5184

NOTE:

(A) Based on present conditions.
If at some future time premiums to producers become widespread, this cost may have to be adjusted to reflect market conditions.

(B) Standardization of milk is not permitted in New York State. 3.6% represents a fair year-round average of our production. If year-round basis is not satisfactory, it can be adjusted on a quarterly, or even a monthly, basis.

FORMULA PRICES FOR RAW MILK -- CHICAGO-CALUMET		Reclassification of Costs Per Hundred Pounds (a) Dr.	Cr.	Price Per Hundred Pounds as Revised
Producer Price 3.5% B.F.	$4.2900			$ 4.2900
Market Administrator's Fee	.0200			.0200
Shrinkage 1%	.0045	.0445		.0490
Procurement Cost, Bulk Tank Premiums, Association Fees, Inner Zone Premiums and Hauling to City Distribution Points	.2500	.3529		.6029
Total Cost of Raw Milk F.O.B. Our Plant To 3.4% B.F.	$4.5645	.3974		$ 4.9619

Class I Price for 3.5% butterfat milk as announced by the Federal Milk Market Administrator under terms of Federal Milk Marketing Order No. 2	$ 5.21
Market Administrator's Fee	.02
Butterfat to 3.6%	.04
Country plant receiving, bulk farm tank pick-up allowances, farm inspection, supervision of country laboratory testing, etc., and hauling in bulk tanks to city plants	.70
Shrinkage 1%	.06
Total Cost of Milk at City Plants	$ 6.03
$.0603 x 2.15 lbs. = Cost per Quart	.1296
Cost per Half-Gallon	.2592
Cost per Gallon	.5184

NOTE:

(A) Based on present conditions. If at some future time premiums to producers become widespread, this cost may have to be adjusted to reflect market conditions.

(B) Standardization of milk is not permitted in New York State. 3.6% represents a fair year-round average of our production. If year-round basis is not satisfactory, it can be adjusted on a quarterly, or even a monthly, basis.

(2) FORMULA PRICES FOR RAW MILK -- CHICAGO-CALUMET

		Reclassification of Costs Per Hundred Pounds (a) Dr.	Cr.	Price Per Hundred Pounds as Revised
Producer Price 3.5% B.F.	$4.2900			$ 4.2900
Market Administrator's Fee	.0200			.0200
Shrinkage 1%	.0045	.0445		.0490
Procurement Cost, Bulk Tank Premiums, Association Fees, Inner Zone Premiums and Hauling to City Distribution Points	.2500	.3529		.6029
Total Cost of Raw Milk F.O.B. Our Plant	$4.5645	.3974		$ 4.9619
To 3.4% B.F. Finished Products	.0740			.0740
Cost of 3.4% Finished Product	$4.4905	.3974		$ 4.8879

*Total Cost of Raw Milk F.O.B. City

MILK COST BY ITEMS

Quart	2.15 lbs. x $4.4905 = $ .0966	2.15 lbs. x $4.8879 = $ .1051
Half-Gallon	4.30 lbs. x 4.4905 = .1931	4.30 lbs. x 4.8879 = .2102
Gallon	8.60 lbs. x 4.4905 = .3862	8.60 lbs. x 4.8879 = .4204

NOTE:

(a) Represents the reclassification of the transport cost of moving products from Woodstock, Illinois, which is approximately 51 miles from Chicago, to City distribution points, from which location the products are loaded in route trucks for distribution to stores. This cost was a part of "Other Delivery Expense."

24 B

Schedule No. 2

THE BORDEN COMPANY
CENTRAL DIVISION

COMPARISON OF WHOLESALE

DELIVERY COSTS-PER POINT
Metropolitan New York - Metropolitan Chicago
Cost per Point Delivered

Item	Metropolitan New York	Metropolitan Chicago
Route Wage Costs and Commissions	$ .0098	$ .0171
Fringe Benefits on Above	.0013	.0027
Route Truck Expense	.0057	.0049
Sub-Total Route Delivery Expense	$ .0168	$ .0247
Supervision	.0002	.0003
Clerical and Billing	.0010	.0010
All Other Costs	.0015	.0018
GRAND TOTAL	$ .0195	$ .0278
Increase Per Point of Chicago Delivery Cost Over Metropolitan New York Delivery Cost		$ .0083
Number of Wholesale Routes	62 Dairy Sealed	42
Average Points per Delivery Day	4,884 " "	3,266
Number of A & P Stores Served	403 " "	170
Average Points Per Day - A & P Stores	752 " "	547

August 4, 1965

Schedule No. 3

THE BORDEN COMPANY

Central Division

Reconciliation of Costs (Other Than Raw Product)

Between New York and Chicago-Calumet

Area	Quotations - Homogenized V.D. Milk		
	Quart Container	Half-Gallon Container	Gallon Container
New York Quotation of 9/3/64			
Container Cost	$ .0200	$ .0330	$ .0650
Processing Charge	.0200	.0400	.0800
Delivery Charge	.0200	.0400	.0700
Other	-	-	-
TOTAL	$ .0600	$ .1130	$ .2150
Chicago-Calumet Quotation of 2/9/65			
Container Cost	$ .0185	$ .0342	$ .0684
Production Expense	.0200	.0400	.0800
Route Delivery Expense	.0225	.0450	.0900
Other Distribution Expense	.0125	.0250	.0500
TOTAL	$ .0735	$ .1442	$ .2884
Increase of Chicago-Calumet Quoted Costs over New York Cost	$ .0135	$ .0312	$ .0734
Chicago-Calumet Costs Adjusted on a Comparable Basis with New York			
Container Cost	$ .0185	$ .0342	$ .0684
Production Expense	.0200	.0400	.0800
Route Delivery Expense	.0225	.0450	.0900
Other Distribution Expense	.0049	.0098	.0196
TOTAL	$ .0659	$ .1290	$ .2580
Increase of Chicago-Calumet Costs as Adjusted on a Comparable Basis with New York	$ .0059	$ .0160	$ .0430
Average Per Quart (Gallons, Half-Gallon & Quarts Converted to Quarts		$ .0082	
Increase in Delivery Cost - Chicago-Calumet over New York-Based on Delivery Methods and Volumes Delivered - Schedule No. 2	$ .0083	$ .0166	$ .0332
Average Per Quart (Gallons, Half-Gallons & Quarts Converted to Quarts		$ .0083	

THE BORDEN COMPANY
CENTRAL DIVISION
CHICAGO-CALUMET AREA

Private Label Quotations For
Quarts, Half-Gallons & Gallons, as Revised

	Per Quart	Per Half-Gallon	Per Gallon
Raw Milk Cost	$.1051	$.2102	$.4204
Container Cost	.0185	.0342	.0684
Production Expense	.0200	.0400	.0800
Route Delivery Expense (A) (Man & Truck Only)	.0425	.0450	.0900
Other Distribution Expense	.0049	.0098	.0196
TOTAL COST	.1710	.3392	.6784
Quotations for Private Label	.1855	.3430	.6860
BORDEN GROSS MARGIN PER UNIT (not including overhead and burden)	$.0145	$.0038	$.0076

Composite Borden Gross Margin Per Quart Per Detail Below

ITEM	Weekly Quarts	Borden Gross Margin	Total
Quarts	40,668	$.0145	$ 589.69
Half-Gallons	202,960	.0019	385.62
Gallons	57,204	.0019	108.69
Total	300,832	-	$1,084.00
Composit Borden Gross Margin Per Quart (not including overhead and burden)		$.0036	

(A) Route Delivery Expense is based on the following:

(1) Six (6) day delivery per week with one (1) delivery per store per day.

(2) Store-Door deliveries. No in-store service.

(3) No Special Deliveries.

(4) No returns, except products inferior in quality and packaging at time of delivery.

8-4-65

Private Label Quotations For
Quarts, Half-Gallons & Gallons, as Revised

	Per Quart	Per Half-Gallon	Per Gallon
Raw Milk Cost	$.1051	$.2102	$.4204
Container Cost	.0185	.0342	.0684
Production Expense	.0200	.0400	.0800
Route Delivery Expense (A) (Man & Truck Only)	.0225	.0450	.0900
Other Distribution Expense	.0049	.0098	.0196
TOTAL COST	.1710	.3392	.6784
Quotations for Private Label	.1855	.3430	.6860
BORDEN GROSS MARGIN PER UNIT (not including overhead and burden)	$.0145	$.0038	$.0076

Composite Borden Gross Margin Per Quart Per Detail Below

ITEM	Weekly Quarts	Borden Gross Margin	Total
Quarts	40,668	$.0145	$ 589.69
Half-Gallons	202,969	.0019	385.62
Gallons	57,204	.0019	108.69
Total	300,832	-	$1,084.00
Composit Borden Gross Margin Per Quart (not including overhead and burden)		$.0036	

(A) Route Delivery Expense is based on the following:

(1) Six (6) day delivery per week with one (1) delivery per store per day.

(2) Store-Door deliveries. No in-store service.

(3) No Special Deliveries.

(4) No returns, except products inferior in quality and packaging at time of delivery.

8-4-65

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Schedule No. 5

THE BORDEN COMPANY
CENTRAL DIVISION

COMPARISON OF SELLING PRICES

		A & P Private Label Homogenized Vitamin D Milk		
		Quart Paper	Half-Gallon Paper	Gallon Paper
Selling Prices in Effect - August 1965 In Metropolitan New York		$ .1978	$ .3913	$ .7717
Class I Price Per Cwt. Under Federal Order No. 2	$ 5.36			
Excess of Metropolitan New York Class I Price Per Cwt. over Chicago-Calumet Class I Superpool Price Per Cwt. $5.36 - $4.29 = $1.07		$ .0230	$ .0460	$ .0920
Converted to:				
Quarts	$1.07 ÷ 46.5 = $.0230			
Half-Gallon	1.07 ÷ 23.25 = .0460			
Gallon	1.07 ÷ 11.625 = .0920			
Selling Prices in Effect - August 1965 In Metropolitan New York Adjusted for Excess in Federal Order No. 2 Class I Price over Chicago-Calumet Class I Price		$ .1748	$ .3453	$ .6797
Selling Price Quotation for Chicago-Calumet Area		$ .1855	$ .3430	$ .6860
Class I Superpool Price Per Cwt. Represented by the Chicago-Calumet Quotation	$ 4.29			
Excess of Chicago-Calumet Bid Quotation over Metropolitan New York August 1965 Selling Price as Adjusted		$ .0107	$(.0023)	$ .0063

Excess of Chicago-Calumet Bid Quotation Over Metropolitan New York August 1965 Selling Price as Adjusted - Weighted on a Per Quart Basis

Item	Weekly Quarts	Excess of Bid Quotation Per Quart	Value
Quart Paper	40,668	$ .0107	$ 425.15
Half-Gallon Paper	202,960	(.0012)	(233.41)
Gallon Paper	57,204	.0016	90.10
Total	300,832	—	$ 281.84
Average Per Quart		(1) $ .0009	

(1) The Chicago-Calumet Bid Quotation is substantially below increased delivery costs due to difference in delivery methods. Home delivery is subject to Union Contract requirements.

635a

		Quart Paper	Half-Gallon Paper	Gallon Paper
Selling Prices in Effect - August 1965 In Metropolitan New York		$ .1978	$ .3913	$ .7717
Class I Price Per Cwt. Under Federal Order No. 2	$ 5.36			
Excess of Metropolitan New York Class I Price Per Cwt. over Chicago-Calumet Class I Superpool Price Per Cwt. $5.36 - $4.29 = $1.07		$ .0230	$ .0460	$ .0920
Converted to:				
Quarts	$1.07 ÷ 46.5 = $.0230			
Half-Gallon	1.07 ÷ 23.25 = .0460			
Gallon	1.07 ÷ 11.625 = .0920			
Selling Prices in Effect - August 1965 In Metropolitan New York Adjusted for Excess in Federal Order No. 2 Class I Price over Chicago-Calumet Class I Price		$ .1748	$ .3453	$ .6797
Selling Price Quotation for Chicago-Calumet Area		$ .1855	$ .3430	$ .6860
Class I Superpool Price Per Cwt. Represented by the Chicago-Calumet Quotation	$ 4.29			
Excess of Chicago-Calumet Bid Quotation over Metropolitan New York August 1965 Selling Price as Adjusted		$ .0107	$(.0023)	$ .0063

Excess of Chicago-Calumet Bid Quotation Over Metropolitan New York August 1965 Selling Price as Adjusted - Weighted on a Per Quart Basis:

Item	Weekly Quarts	Excess of Bid Quotation Per Quart	Value
Quart Paper	40,668	$ .0107	$ 425.15
Half-Gallon Paper	202,960	(.0012)	(233.41)
Gallon Paper	57,204	.0016	90.10
Total	300,832	—	$ 281.84
Average Per Quart		(1) $ .0009	

(1) The Chicago-Calumet Bid Quotation is substantially below increased delivery costs due to difference in delivery methods and wage rates; both subject to Union Contract Requirements.

00209

8/4/65

636a

THE BORDEN COMPANY
CENTRAL DIVISION

WEEKLY ROUTE MILK COST COMPARISON

Item	(Chicago-Calumet Route Wage Costs Based On:) New York Dairy Sealed Union Contract Local #602	Chicago Union Contract Local #753 Teamsters
Base Wage - Regular Routeman	$ 89.95	$ 134.10
" " - Relief Routeman	18.79	28.22
" " - Route Foreman	7.30	7.31
Commissions	64.67	148.58
Paid Holidays and Death Leave	3.30	1.63
Paid Vacations	9.40	9.77
Employer Pension and Welfare Contributions	29.90	33.12
Federal and State Payroll Taxes	7.41	9.88
Workmen's Compensation Insurance	5.80	2.65
Total Weekly Route Wage Cost	$ 236.52	$ 375.26
Weekly Route Load in Points (Chicago Average)	19,596	19,596
Average Route Wage Cost Per Point	$ .0121	$ .0192
Increase Per Point of Chicago Route Wage Cost Over New York Dairy Sealed Route Wage Cost Related to Chicago Route Volume		(1) $ .0071

(1) This schedule is designed to show the increase in wholesale route wage costs which result only from differences in Union Contract wage, commission rates, and employer's route wage costs based on similar volume loads.

It does not consider the further difference in the cost per point delivered which results from the differing methods possible under the union contracts in effect, health department regulations, and route load volume in the respective New York and Chicago markets.

60170

CX 25

Memo - Re: A&P

Minkler, Fagerson & Malone went to see Bartels at A&P office.

Purpose was to review with Bartels the results of the review made covering the elements of cost embracing the New York bid as compared with the Chicago Calumet bid.

Previous visits with Bartels by Minkler, Bartels indicated that there were substantial cost differences between N.Y. and Chicago and that he wanted such differences explained.

Appointment was for 2. P.M. and we saw Bartels about 2.10 P.M.

Minkler indicated to Bartels that possibly we could use their meeting rooms so that we could lay out the results of our review and also be undisturbed in our conference.

Bartels indicated that this was not possible due to pressure of time but he would listen to what we had to say and we retired to his office.

Minkler then proceeded to explain that we had made an exhaustive comparison of the cost elements involved in both markets and he would like to review a report comparison that had been prepared which outlined the various differences involved. Bartels cut this approach rather short indicating that he was not concerned about our costs as such compared with N.Y. or our problems - all he wanted to really know as a buyer, what was our price - that we were sure of our price and that he did not want to be in a position where we would come back and request another chance.

Minkler kept pressing that there were significant

factors that had to be recognized in any comparison between the two markets - pointing out the various elements of cost required in the area of raw product costs to make a comparable review. Some discussion was held in this regard.

Minkler also pointed out that there was a significant difference in route delivery costs between the two markets.

This led into a review of the difference of wage rates, both inside and outside employees and Bartels was shown the schedule disclosing the rates and percentage increase in Chicago over New York. Bartels inquired as to Woodstock plant, indicating that our indicated cost was the same as New York, and inquired as to why it should not be lower. In this regard it was pointed out to Bartels that there was a substantial wage rate differential. Also it was indicated that the productive output per manhour had increased and that plant costs presently were down 15%. Up to this point we had taken about 40 minutes of time and Bartels indicated that he had a pressing matter with Mr. Vogel(?).

Minkler left with Bartels a copy of the reconciliation report and Bartels indicated he would try to review same over the week end and would be in touch.

It was understood that Minkler and Bartels would meet on Monday and further discuss the matter.

Mr. Mackey, Engineer of Motive Power to see Bartle at his office.

Purpose was to discuss with Bartle the result of the recent tests covering the elements of cost in locomotive use New York Div. as compared with the Chicago Division Div.

Previous meeting with Bartle by Mr. Mackey, Bartle indicated that there were substantial cost differences between N.Y. and Chicago and that he wanted same differences explained.

Appointment was for 2 P.M. but was seen Bartle about 2.10 P.M.

Mr. Mackey indicated to Bartle that possibly we could use these meeting notes so that we could lay out the result of our survey and also be understood as our conference.

Bartle indicated that this was not possible due to pressure of time but he would letter to what was due to say and we return to him again.

Mr. Mackey then proceeded to explain what we had made as the tentative comparisons of the cost elements involved and that unless Bartle could do so we could not be in any position that they have proper authority to approve the various differences involved.

Bartle said that approval existed existing what he was not concerned about our costs as long as Mr. Ell as our president - all he wanted to know was if Harper, whose area was given that was where most of our power was, what he did not want to do was to question what we would use but accept our costs theory.

Mr. Mackey left pressing that they were responsible

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2/6/32 fp

CX 25D

6:40a

83

factors which tend to do away with the very wide
between the two markets - primary and the many
of elements of cost enjoyed on the new product
product costs to make a comparable review.
Some discussion was held on this point.
Mr. Markle also pointed out that there was
significant difference in quality between both
the two markets.
Schedule visit to review of the diffusion of new
water, both vessels and vessels employed and Bu
were shown the schedule showing the water and
production figures as shown on Mr. Markle's
Battle inquired as to Wandstat product, and
that was indicated water was the same as Mr.
York, and inquired as to why it should not
lower for this region as was stated at the
Battle's about there was a substantial margin
difference. They at was indicated that the
production output per machine hour was
and what product costs presently were and
up to this point we have taken about 60 minu
of time and Battle indicated that in time
a premium quality work Mr. Wands.
Markle left with Battle a copy of the
recommendation report and Battle indicated he
would try to review same, was the most work
would do on it.
It was understood that Markle and Battle w
meet on Monday with further review the possibi

RX 108-1B
2/10/72

CX 25E

THE BORDEN COMPANY

CENTRAL DIVISION

WAGE RATE COMPARISON

	New York Local 602	Chicago Local 754	Increase Per Wk.	Increase %
Pasteurizing Foreman	$121.50	$143.00	$21.50	17.7
Pasteurizer	121.50	138.00	16.50	13.6
Weighmaster and Tester	121.50	131.50	10.00	8.2
General Utility	116.00	128.50	12.50	10.7
Paper Package Operators	115.00	135.00	20.00	17.4
Platform and Yard Men	120.50	128.50	8.50	7.1
Watchmen	109.00	128.50	17.50	16.1
Car Washers	116.00	128.50	12.50	10.7
Mechanics	123.00	151.60	28.60	23.2
Mechanic's Helpers	111.50	136.00	24.50	21.9
Route Rider	93.95	140.10	47.15	50.1
Route Foreman	146.00	146.20	.20	-
Routemen -- Base	89.95	134.10	44.15	49.1
Routemen -- Commission *	64.67	* 148.58	83.91	129.7

*Based on similar volume -- Chicago's Wholesale Average of 19,596 points per week.

Inside Workers Wage Cost approximates $11,000 annually in Chicago.

Wholesale Route Driver Wages only approximate $14,700 annually in Chicago.

Wholesale Route Wage Cost to Employer approximates $19,500 annually in Chicago.

00160

CX 26

4/11 - H Smith -

Suggest beds from other
Union Warden - ERS 4/11 - Banana
Wingu - Census - Jail - Backyard

Who sent him up from
Warden re Complaints etc.

643a

643a

ZONE I

Chicago and Calumet Area

Prices as of May 6

Commodity	Yearly Usage	Borden Label Unit Cost	Borden Label Annual Cost	A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo Paper	773,327	.6277* .7371	485,231 $ 570,024	.6860	$ 530,504	$ 39,520
1/2 Gals. Homo	5,321,403	.3136 .3685	1,668,792 1,960,937	.3430	1,825,235	135,702
Qts. Homo	2,194,591	.1696 .2000	372,203 438,915	.1855	407,091	31,824
Qts. Chocolate	163,037	.2080 .2437	33,912 39,728	.2387	38,913	815
1/2 Gals. Buttermilk	331,344	.3136 .3685	103,909 122,096	.3350	111,000	11,096
Qts. Buttermilk	542,083	.1477 .2000	79,795 108,420	.1720	93,238	15,182
1/2 Gals. 2%	612,231	.2941 .3453	180,241 211,397	.3220	197,149	14,248
1/2 Gals. Skim	515,996	.3008 .3453	155,212 178,169	.3200	165,119	13,050
Qts. Skim	445,587	.1637 .1917	72,120 85,419	.1600	71,294	14,125
1/2 Pts. Whip Cream	256,481	.2560 .3068	65,659 78,693	.2700	69,250	9,443
Pts. Half & Half	1,577,403	.2496 .2984	393,720 470,704	.2600	410,125	60,579
			$ 4,264,502 3,611,194		$ 3,919,956	$ 345,584

Revised figures all Borden quotes - all Zones

B SHA

February 9, 1965

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price - 3.5% B.F.	$ 4.2900
Market Administrator's Fee	.0200
Shrinkage 1%	.0045
Procurement, Bulk Tank Premiums Association Fees, Inner Zone Premiums, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$ 4.5645
To 3.4% B.F. Finished Product	.0740
Cost of 3.4% Finished Product	$ 4.4905

MILK COST BY ITEMS

Quart	2.15 pounds x $4.4905 per cwt.	=	$ .0966
Half Gallon	4.30 pounds x $4.4905 per cwt.	=	.1931
Gallon	8.60 pounds x $4.4905 per cwt.	=	.3862

CHICAGO-CALUMET AREA

Price Change Per Unit

(Related to the Present Announced Super Pool Class I Price of $4.29 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

 February 9, 1965

CHICAGO-CALUMET AREA

Price Change Per Unit

(Related to the Present Announced Super Pool Class I Price of $4.29 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

Schedule #4

February 9, 1965
(Revised on August 13, 1965)

The Borden Company

Chicago-Calumet Area

General Quotation - A & P Private Label

(Related to the Present Announced Super Pool Class I Price of $4.29)

	Net for Borden Label	Net for A & P Private Label
Homo V D Milk - Gal. Paper	$ .7371	$ .6860
Homo V D Milk - 1/2 Gal. Paper	.3685	.3430
Homo V D Milk - Quart Paper	.2000	.1855
2% - Gal. Paper	.6906	.6440
2% - 1/2 Gal. Paper	.3453	.3220
Vitamin Fortified Skim - 1/2 Gal. Paper	.3453	.3200
Vitamin Fortified Skim - Quart Paper	.1917	.1600
Half and Half - Pint Paper	.2984	.2600
Chocolate Milk - Quart Paper	.2437	.2387
Buttermilk - 1/2 Gal. Paper	.3685	.3350
Buttermilk - Quart Paper	.2000	.1720
Whipping Cream - 1/2 Pint Paper	.3068	.2700

In the above listing, we have not included half and half quarts, sour cream, sour half and half, sour cream dips, triple whip and yogurt. Production of these items under private label, in addition to our regular brand, adversely affects production costs substantially because the items are required in limited quantity.

/2

CHICAGO, CHICAGO SUBURBAN & CALUMET AREAS

Includes The Following Cities and Towns:

ILLINOIS

Chicago
Arlington Heights
Barrington
Batavia
Bensenville
Berwyn
Blue Island
Brookfield
Chicago Heights
Chicago Ridge
Cicero
Des Plaines
Dolton
Downers Grove
Dundee
Elgin
Elmhurst
Evanston
Evergreen Park
Franklin Park
Glen Ellyn
Glenview
Harvey
Highland Park
Highwood
Homewood
La Grange
Lake Bluff
Lake Forest
Libertyville
Maywood
Midlothian
Mt. Prospect
Mundelein
Naperville
Niles
Norridge
Northbrook
Oak Lawn
Oak Park
Palatine
Park Ridge
Richton Park
Riverside
Schaumberg
Skokie
St. Charles
Summit
Villa Park
Waukegan
Western Springs
Wheaton
Wilmette
Winnetka

INDIANA

East Chicago
Gary
Hammond
Hobart
Portage
Munster
Whiting

649a

ZONE II
South Bend Area

Prices as of May 8

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost		A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	129,272	.6305	$ 81,501	3 day	.6090	$ 78,884	$ 2,617
				6 day	.6640		
1/2 Gals. Homo	493,064	.3203	157,907	3 day	.3080	152,412	5,495
				6 day	.3355		
Qts. Homo	97,431	.1694	16,501	3 day	.1630	15,929	572
				6 day	.1760		
Qts. Chocolate	10,400	.2166	2,253	3 day	.2156	2,253	-
				6 day	.2516		
1/2 Gals. Buttermilk	23,504	.3193	7,505	3 day	.3084	7,263	242
				6 day	.3389		
Qts. Buttermilk	29,276	.1687	4,940	3 day	.1550	4,541	399
				6 day	.1680		
1/2 Gals. 2%	101,781	.2965	30,177	3 day	.2800	28,600	1,577
				6 day	.3035		
1/2 Gals. Skim	21,216	.2852	6,050	3 day	.2600	5,529	521
				6 day	.2785		
Qts. Skim	11,371	.1601	1,820	3 day	.1555	1,768	52
				6 day	.1708		
1/2 Pts. Whip Cream	14,109	.2555	3,605	3 day	.2490	3,536	69
				6 day	.2720		
Pts. Half & Half	76,076	.2465	18,755	3 day	.2390	18,217	533
				6 day	.2480		
			$ 331,014			$ 318,932	$ 12,082

B-Ent B

Schedule No. 1 - Part 1

Revised
July 26, 1965.

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$4.3200
Market Administrator's Fee	.0200
Shrinkage	.0045
Procurement, Bulk Tank Premiums, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.5945
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$4.5245

MILK COST BY ITEMS

Quarts 2.15 pounds X $4.5245 per cwt.	= $.0973
Half Gallons 4.30 pounds X 4.5245 per cwt.	= .1946
Gallons 8.60 pounds X 4.5245 per cwt.	= .3891

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Schedule No. 1 - Part 2

Revised July 26, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to Present Announced Superpool Class I Price of $4.32 Per CWT.)

Net Price for A & P Private Label Products by Type and Method of Delivery

Private Label Products	3-Day Per Wk. Drop Delv'y.	4-Day Per Wk. Drop Delv'y.	5-Day Per Wk. Drop Delv'y.	6-Day Per Wk. Convent'l. Delivery
Homo V.D. Milk - Gal. Paper	$.6090	$.6440	$.6540	$.6640
Homo V.D. Milk - 1/2 Gal. Paper	.3080	.3255	.3305	.3355
Homo V.D. Milk - Quart Paper	.1630	.1700	.1730	.1760
2% - 1/2 Gal. Paper	.2800	.2935	.2985	.3035
Vitamin Fortified Skim - 1/2 Gal. Paper	.2600	.2685	.2735	.2785
Vitamin Fortified Skim - Quart Paper	.1555	.1648	.1678	.1708
Half & Half - Pint Paper	.2390	.2420	.2450	.2480
Chocolate Milk - Quart Paper	.2156	.2456	.2486	.2516
Buttermilk - 1/2 Gal. Paper	.3084	.3289	.3339	.3389
Buttermilk - Quart Paper	.1550	.1620	.1650	.1680
Whipping Cream - 1/2 Pint Paper	.2490	.2660	.2690	.2720

Prices apply to stores located in the geographical area subject to the terms of the Chicago Super Pool which are as follows:

Stores Receiving 3-Day Per Week Delivery:

South Bend (6 stores), Mishawaka, Elkhart, Goshen, La Porte, Valparaiso, Walkerton and Michigan City.

Stores Receiving 6-Day Per Week Delivery:

Chesterton, South Bend (1 store).

Stores Receiving 4-Day and 5-Day Per Week Delivery:

None

Drop Delivery recognizes store door deliveries - no in-store service; no special deliveries and no returns except products inferior in quality and packaging at time of delivery.

Conventional Delivery recognizes full service delivery; no special deliveries and no returns except products inferior in quality and packaging at time of delivery.

Schedule No. 1 - Part 3

Revised July 26, 1965

Price Change Per Unit

(Related to the Present Announced Chicago Super Pool Class I Price of $4.32 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

Schedule No. 1 - Part 3
Page 2

Revised July 26, 1965

Price Change Per Unit

(Related to the Present Announced Chicago Super Pool Class I Price of $4.32 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

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Prices as of May 8

ZONE III

Rockford Joliet Area

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost	A & P Label Unit Cost	A &P Label Annual Cost	Differential Annual Basis
Gals. Homo	50,353	.7305	31,581 $ 36,781	.6960	$ 35,048	$ 1,733
1/2 Gals. Homo	251,507	.3136 .3645	78,873 91,676	.3480	87,533	4,143
Qts. Homo	63,076	.1696 .1907	10,698 12,029	.1810	11,423	606
Qts. Chocolate	13,919	.2080 .2403	2,895 3,345	.2330	3,241	104
1/2 Gals. Buttermilk	20,124	.3136 .3643	6,311 7,332	.3544	7,124	208
Qts. Buttermilk	30,957	.1474 .1893	4,557 5,859	.1810	5,599	260
1/2 Gals. 2%	97,725	.2844 .3347	28,770 32,708	.3230	31,564	1,144
1/2 Gals. Skim	25,116	.3008 .3306	7555 8,303	.3080	7,731	572
Qts. Skim	15,600	.1634 .1789	2546 2,791	.1695	2,652	139
1/2 Pts. Whip Cream	29,588	.2560 .2882	7575 8,528	.2813	8,320	208
Pts. Half & Half	58,725	.2496 .2807	14,658 16,484	.2570	15,097	1,387
			$ 225,836 196,019		$ 215,332	$ 10,504

Schedule No. 2 - Part 1.

Revised
July 26, 1965.

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$4.0000
Market Administrator's Fee	.0200
Shrinkage	.0043
Procurement, Bulk Tank Premium, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.2743
To 3.4% B.F. Finished Product	..0700
Cost of 3.4% Finished Product	$4.2043

MILK COSTS BY ITEMS

Quarts 2.15 pounds X $4.2043 per cwt.	= $.0904
Half Gallons 4.30 pounds X 4.2043 per cwt.	= .1808
Gallons 8.60 pounds X 4.2043 per cwt.	= .3616

Schedule No. 2 - Part 2

Revised July 26, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to Present Announced Superpool Class I Price of $4.00 Per CWT.)

Private Label Products	Net Price for A & P Private Label Products by Type and Method of Delivery			
	3-Day Per Wk. Drop Delv'y.	4-Day Per Wk. Drop Delv'y.	5-Day Per Wk. Drop Delv'y.	6-Day Per Wk. Convent'l. Delivery
Homo V.D. Milk - Gal. Paper	$.6410	$.6760	$.6860	$.6960
Homo V.D. Milk - 1/2 Gal. Paper	.3205	.3380	.3430	.3480
Homo V.D. Milk - Quart Paper	.1680	.1750	.1780	.1810
2% - 1/2 Gal. Paper	.2995	.3130	.3180	.3230
Vitamin Fortified Skim - 1/2 Gal. Paper	.2895	.2980	.3030	.3080
Vitamin Fortified Skim - Quart Paper	.1542	.1635	.1665	.1695
Half & Half - Pint Paper	.2480	.2510	.2540	.2570
Chocolate Milk - Quart Paper	.1970	.2270	.2300	.2330
Buttermilk - 1/2 Gal. Paper	.3239	.3444	.3494	.3544
Buttermilk - Quart Paper	.1680	.1750	.1780	.1810
Whipping Cream - 1/2 Pint Paper	.2583	.2753	.2783	.2813

Prices apply to stores located in the geographical area subject to the terms of the Rockford Superpool which are as follows:

Stores Receiving 6-Day Per Week Delivery:

Lockport, Aurora (2 stores), Joliet (6 stores), Rockford (5 stores), Freeport and Loves Park.

Stores Receiving 3-Day - 4-Day - or 5-Day Per Week Delivery:

None

Drop Delivery recognizes store door deliveries - no in-store service; no special deliveries and no returns except products inferior in quality and packaging at time of delivery.

Conventional Delivery recognizes full service delivery; no special deliveries and no returns except products inferior in quality and packaging at time of delivery.

Schedule No. 2 - Part 3

Revised July 26, 1965

Price Change Per Unit

(Related to the Present Announced Rockford Super Pool Class I Price of $4.00 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

Revised July 26, 1965

Price Change Per Unit

(Related to the Present Announced Rockford Super Pool Class I Price of $4.00 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

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ZONE IV

Prices as of May 8

Miscellaneous Area

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost	A & P Label Unit Cost (Average)	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	158,479	.6274 .6866	99,318 $ 108,819	.6546	$ 103,740	$ 5,079
1/2 Gals. Homo	723,095	.3136 .3501	226,763 253,188	.3286	237,623	15,565
Qts. Homo	141,908	.1696 .1837	24,068 26,069	.1708	24,232	1,837
Qts. Chocolate	23,487	.2080 .2325	4,885 5,460	.2118	4,975	485
1/2 Gals. Buttermilk	30,264	.3136 .3580	9,491 10,833	.3316	10,036	797
Qts. Buttermilk	52,468	.1477 .1843	7,723 9,672	.1721	9,031	641
1/2 Gals. 2%	124,193	.2914 .3232	36,562 40,144	.3045	37,821	2,323
1/2 Gals. Skim	30,663	.3008 .3273	9,223 10,036	.2945	9,031	1,005
Qts. Skim	27,109	.1634 .1707	4,424 4,628	.1567	4,247	381
1/2 Pts. Whip Cream	48,967	.2560 .2917	12,536 14,283	.2623	12,844	1,439
Pts. Half & Half	156,381	.2496 .2742	39,033 42,883	.2462	38,497	4,386
			$ 526,015 474106		$492,077	$ 33,938

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Schedule No. 3 - Part 1.

Revised
July 26, 1965.

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$3.7800
Market Administrator's Fee	.0200
Shrinkage	.0041
Procurement, Bulk Tank Premiums, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.0541
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$3.9841

MILK COSTS BY ITEMS

Quarts 2.15 pounds X $3.9841 per cwt.	= $.0857
Half Gallons 4.30 pounds X 3.9841 per cwt.	= .1713
Gallons 8.60 pounds X 3.9841 per cwt.	= .3426

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Schedule No. 3 - Part 2

Revised July 26, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to the Announced Class I Price Under Federal Order No. 30 of $3.78 Per CWT.)

Net Price for A & P Private Label Products by Type and Method of Delivery

Private Label Products	3-Day Per Wk. Drop Delv'y.	4-Day Per Wk. Drop Delv'y.	5-Day Per Wk. Drop Delv'y.	6-Day Per Wk. Drop Delivery
Homo V.D. Milk - Gal. Paper	$.6216	$.6566	$.6666	$.6766
Homo V.D. Milk - 1/2 Gal. Paper	.3108	.3283	.3333	.3383
Homo V.D. Milk - Quart Paper	.1644	.1714	.1744	.1774
2% - 1/2 Gal. Paper	.2898	.3033	.3083	.3133
Vitamin Fortified Skim - 1/2 Gal. Paper	.2798	.2883	.2933	.2983
Vitamin Fortified Skim - Quart Paper	.1474	.1567	.1597	.1627
Half & Half - Pint Paper	.2414	.2444	.2474	.2504
Chocolate Milk - Quart Paper	.1934	.2234	.2264	.2294
Buttermilk - 1/2 Gal. Paper	.3078	.3283	.3333	.3383
Buttermilk - Quart Paper	.1644	.1714	.1744	.1774
Whipping Cream - 1/2 Pint Paper	.2484	.2654	.2684	.2714

Prices apply to stores located in the geographical area subject to the announced Class I milk prices under Federal Order No. 30, (which Class I milk prices are not subject to producer "superpool" payments) which stores are as follows:

Stores Receiving 3-Day Per Week Delivery:

Manteno	Momence	St. Annes	Gilman	La Salle
Marseilles	Ottawa	Streator	Pontiac	Princeton
Spring Valley	Sandwich	Plano	Lacon	Minonk
Culver	Knox	North Judson	Galena	Warren

Stores Receiving 4-Day Per Week Delivery:

None

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Stores Receiving 5-Day Per Week Delivery:

Belvidere	Marengo	DeKalb
Rochelle	Polo	Mt. Morris
Dixon		

Stores Receiving 6-Day Per Week Delivery:

Woodstock	McHenry
Fox Lake	Antioch
Kankakee (2 stores)	Wauconda
Pecatonica	Crystal Lake
Wilmington	Zion

Drop Delivery recognizes store door deliveries - no in-store service; no special deliveries and no returns except products inferior in quality and packaging at time of delivery.

Conventional Delivery recognizes full service delivery; no special deliveries and no returns except products inferior in quality and packaging at time of delivery.

Schedule No. 3 - Part 3

Revised July 26, 1965

Price Change Per Unit

(Related to the Federal Order No. 30 Announced Class I Price of $3.78 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

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Schedule No. 3 - Part 3
Page 2

Revised July 26, 1965

Price Change Per Unit

(Related to the Federal Order No. 30 Announced Class I Price of $3.78 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

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Prices as of M. ; 3

ZONE V

Rock Island Area

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost	A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	148,911	.6066	$ 90,324	.5872	$ 87,447	$ 2,877
1/2 Gals. Homo	255,840	.3035	77,636	.2938	75,175	2,461
Qts. Homo	106,652	.1710	18,235	.1661	17,715	520
Qts. Chocolate	15,600	.1933	3,016	.1883	2,947	69
Qts. Buttermilk	28,617	.1714	4,905	.1666	4,767	138
1/2 Gals. 2%	87,013	.2743	23,868	.2646	23,019	849
1/2 Gals. Skim	37,613	.2627	9,880	.2531	9,516	364
Qts. Skim	22,585	.1573	3,553	.1523	3,432	121
1/2 Pts. Whip Cream	23,157	.2717	6,292	.2671	6,188	104
Pts. Half & Half	86,216	.2445	21,077	.2399	20,679	398
			$ 258,786		$ 250,885	$ 7,901

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Schedule No. 4 - Part 1

Revised
July 26, 1965.

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$3.8800
Market Administrator's Fee	.0200
Milk Foundation and City Health Inspection Fee	.0200
Waste	.0040
Premiums	.1000
Total Cost of 3.5% Raw Milk F.O.B. Our Plant To 3.4% B.F. Finished Product	$4.0240 .0720
Cost of 3.4% Finished Product	$3.9520

MILK COSTS BY ITEMS

Quarts 2.15 pounds X $3.9520	= $.0850
Half Gallons 4.30 pounds X 3.9520	= .1699
Gallons 8.60 pounds X 3.9520	= .3398

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Schedule No. 4 - Part 2

Revised July 26, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to the Announced Class I Price Under Federal Order No.63 of $3.88 per c

Net Price for A & P Private Label Produ. by Type and Method of Delivery

Private Label Products	3-Day Per Wk. Drop Delv'y.	4-Day Per Wk. Drop Delv'y.	5-Day Per Wk. Drop Delv'y.	6-Day Per Wk. Convent'l Delivery
Homo V. D. Milk - Gal. Paper	.5872	.6222	.6322	.6422
Homo V. D. Milk - 1/2 Gal. Paper	.2938	.3113	.3163	.3213
Homo V. D. Milk - Quart Paper	.1661	.1731	.1761	.1791
2% - 1/2 Gal. Paper	.2646	.2781	.2831	.2881
Vitamin Fortified Skim Milk-1/2 Gal. Paper	.2531	.2616	.2666	.2716
Vitamin Fortified Skim " Qt.-Paper	.1523	.1616	.1646	.1676
Half and Half - Pint Paper	.2399	.2429	.2459	.2489
Chocolate Milk - Quart Paper	.1883	.2183	.2213	.2243
Buttermilk - Quart Paper	.1666	.1736	.1766	.1796
Whipping Cream - 1/2 Pint Paper	.2671	.2841	.2871	.2901

Prices apply to stores in the geographical area subject to the announced Class I Milk prices under Federal Order No. 63, (which Class I Milk prices are not subject to producer "Super Pool" payments) which stores are as follows:

Stores Receiving 3 Day Per Week Delivery

Geneseo Kewanee Lanark Moline (2 Stores)
Mt. Carroll Rock Island Savannah Sterling
Toulon Galesburg (2 Stores) Clinton Davenport (2 Stores)

Stores Receiving 4 Day, 5 Day or 6 Day Delivery

None.

Drop Delivery recognizes store-door deliveries - no in-store service; no special deliveries and no returns except products inferior in quality and packaging at the time of delivery.

Conventional Delivery recognizes full service delivery; no special deliveries and no returns, except products inferior in quality and packaging at time of delivery.

Schedule No. 4 - Part 3

Revised July 26, 1965

Price Change Per Unit

(Related to the Federal Order No. 63 Announced Class I Price of $3.88 per CWT.)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

Schedule No. 4 - Part 3
Page 2

Revised July 26, 1965

Price Change Per Unit

(Related to the Federal Order No. 63 Announced Class I Price of $3.88 per CWT.)

Increase or Decrease Per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

ZONE I

Chicago and Calumet Area

Prices as of May 8

Commodity	Yearly Usage	Borden Label Unit Cost	Borden Label Annual Cost	A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo Paper	773,327	.7371	$ 570,024	.6860	$ 530,504	$ 39,520
1/2 Gals. Homo	5,321,403	.3685	1,960,937	.3430	1,825,235	135,702
Qts. Homo	2,194,591	.2000	438,915	.1855	407,091	31,824
Qts. Chocolate	163,037	.2437	39,728	.2387	38,913	815
1/2 Gals. Buttermilk	331,344	.3685	122,096	.3350	111,000	11,096
Qts. Buttermilk	542,083	.2000	108,420	.1720	93,238	15,182
1/2 Gals. 2%	612,231	.3453	211,397	.3220	197,149	14,248
1/2 Gals. Skim	515,996	.3453	178,169	.3200	165,119	13,050
Qts. Skim	445,587	.1917	85,419	.1600	71,294	14,125
1/2 Pts. Whip Cream	256,481	.3068	78,693	.2700	69,250	9,443
Pts. Half & Half	1,577,403	.2984	470,704	.2600	410,125	60,579
			$ 4,264,502		$ 3,919,956	$ 345,584

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South Bend Area

Prices as of May 8

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost		A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	129,272	.6305	$ 81,501	3 day 6 day	.6090 .6640	$ 78,884	$ 2,617
1/2 Gals. Homo	493,064	.3203	157,907	3 day 6 day	.3080 .3355	152,412	5,495
Qts. Homo	97,431	.1694	16,501	3 day 6 day	.1630 .1760	15,929	572
Qts. Chocolate	10,400	.2166	2,253	3 day 6 day	.2156 .2516	2,253	-
1/2 Gals. Buttermilk	23,504	.3193	7,505	3 day 6 day	.3084 .3389	7,263	242
Qts. Buttermilk	29,276	.1687	4,940	3 day 6 day	.1550 .1680	4,541	399
1/2 Gals. 2%	101,781	.2965	30,177	3 day 6 day	.2800 .3035	28,600	1,577
1/2 Gals. Skim	21,216	.2852	6,050	3 day 6 day	.2600 .2785	5,529	521
Qts. Skim	11,371	.1601	1,820	3 day 6 day	.1555 .1708	1,768	52
1/2 Pts. Whip Cream	14,109	.2555	3,605	3 day 6 day	.2490 .2720	3,536	69
Pts. Half & Half	76,076	.2465	18,755	3 day 6 day	.2390 .2480	18,217	5
			$ 331,014			$ 318,932	$

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ZONE III

Prices as of May

Rockford Joliet Area

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost	A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	50,353	.7305	$ 36,781	.6960	$ 35,048	$ 1,733
1/2 Gals. Homo	251,507	.3645	91,676	.3480	87,533	4,143
Qts. Homo	63,076	.1907	12,029	.1810	11,423	606
Qts. Chocolate	13,919	.2403	3,345	.2330	3,241	104
1/2 Gals. Buttermilk	20,124	.3643	7,332	.3544	7,124	208
Qts. Buttermilk	30,957	.1893	5,859	.1810	5,599	260
1/2 Gals. 2%	97,725	.3347	32,708	.3230	31,564	1,144
1/2 Gals. Skim	25,116	.3306	8,303	.3080	7,731	572
Qts. Skim	15,600	.1789	2,791	.1695	2,652	139
1/2 Pts. Whip Cream	29,588	.2882	8,528	.2813	8,320	208
Pts. Half & Half	58,725	.2807	16,484	.2570	15,097	1,387
			$ 225,836		$ 215,332	$ 10,504

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ZONE IV

Prices as of May 8

Miscellaneous Area

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost	A & P Label Unit Cost (Average)	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	158,479	.6866	$ 108,819	.6546	$ 103,740	$ 5,079
1/2 Gals. Homo	723,095	.3501	253,188	.3286	237,623	15,565
Qts. Homo	141,908	.1837	26,069	.1708	24,232	1,837
Qts. Chocolate	23,487	.2325	5,460	.2118	4,975	485
1/2 Gals. Buttermilk	30,264	.3580	10,833	.3316	10,036	797
Qts. Buttermilk	52,468	.1843	9,672	.1721	9,031	641
1/2 Gals. 2%	124,193	.3232	40,144	.3045	37,821	2,323
1/2 Gals. Skim	30,663	.3273	10,036	.2945	9,031	1,005
Qts. Skim	27,109	.1707	4,628	.1567	4,247	381
1/2 Pts. Whip Cream	48,967	.2917	14,283	.2623	12,844	1,439
Pts. Half & Half	156,381	.2742	42,883	.2462	38,497	4,386
			$ 526,015		$492,077	$ 33,938

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Prices as of May 8

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ZONE V

Rock Island Area

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost	A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	148,911	.6066	$ 90,324	.5872	$ 87,447	$ 2,877
1/2 Gals. Homo	255,840	.3035	77,636	.2938	75,175	2,461
Qts. Homo	106,652	.1710	18,235	.1661	17,715	520
Qts. Chocolate	15,600	.1933	3,016	.1883	2,947	69
Qts. Buttermilk	28,617	.1714	4,905	.1666	4,767	138
1/2 Gals. 2%	87,013	.2743	23,868	.2646	23,019	849
1/2 Gals. Skim	37,613	.2627	9,880	.2531	9,516	364
Qts. Skim	22,585	.1573	3,553	.1523	3,432	121
1/2 Pts. Whip Cream	23,157	.2717	6,292	.2671	6,188	104
Pts. Half & Half	86,216	.2445	21,077	.2399	20,679	398
			$ 258,786		$ 250,885	$ 7,901

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8/13/65

THE BORDEN COMPANY

CENTRAL DIVISION

Summary of Decreased A & P Private Label Cost

Area 1		$345,584
Area 2		12,082
Area 3		10,504
Area 4		33,938
Area 5		7,901
	Total	$410,009

ZONE 1

Chicago and Calumet Area

Commodity	Yearly Usage	Borden Label Unit Cost	Borden Label Annual Cost	A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo Paper	773,327	.7371	$ 570,024	.6860	$ 530,504	$ 39,520
1/2 Gals. Homo	5,321,403	.3685	1,960,937	.3430	1,825,235	135,702
Qts. Homo	2,194,591	.2000	438,915	.1855	407,091	31,824
Qts. Chocolate	163,037	.2437	39,728	.2387	38,913	815
1/2 Gals. Buttermilk	331,344	.3685	122,096	.3350	111,000	11,096
Qts. Buttermilk	542,083	.2000	108,420	.1720	93,238	15,182
1/2 Gals. 2%	612,231	.3453	211,397	.3220	197,149	14,248
1/2 Gals. Skim	515,996	.3453	178,169	.3200	165,119	13,050
Qts. Skim	445,587	.1917	85,419	.1600	71,294	14,125
1/2 Pts. Whip Cream	256,481	.3068	78,693	.2700	69,250	9,443
Pts. Half & Half	1,577,403	.2984	470,704	.2600	410,125	60,579
			$ 4,264,502		$ 3,919,956	$ 345,584

37 B

679a

ZONE II
South Bend Area

Prices as of May 8

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost		A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	129,272	.6305	$ 81,501	3 day 6 day	.6090 .6640	$ 78,884	$ 2,617
1/2 Gals. Homo	493,064	.3203	157,907	3 day 6 day	.3080 .3355	152,412	5,495
Qts. Homo	97,431	.1694	16,501	3 day 6 day	.1630 .1760	15,929	572
Qts. Chocolate	10,400	.2166	2,253	3 day 6 day	.2156 .2516	2,253	-
1/2 Gals. Buttermilk	23,504	.3193	7,505	3 day 6 day	.3084 .3389	7,263	242
Qts. Buttermilk	29,276	.1687	4,940	3 day 6 day	.1550 .1680	4,541	399
1/2 Gals. 2%	101,781	.2965	30,177	3 day 6 day	.2800 .3035	28,600	1,577
1/2 Gals. Skim	21,216	.2852	6,050	3 day 6 day	.2600 .2785	5,529	521
Qts. Skim	11,371	.1601	1,820	3 day 6 day	.1555 .1708	1,768	52
1/2 Pts. Whip Cream	14,109	.2555	3,605	3 day 6 day	.2490 .2720	3,536	69
Pts. Half & Half	76,076	.2465	18,755	3 day 6 day	.2390 .2480	18,217	538
			$ 331,014			$ 318,932	$ 12,082

37 c

ZONE III

Prices as of May 8

Rockford Joliet Area

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost	A & P Label Unit Cost	A &P Label Annual Cost	Differential Annual Basis
Gals. Homo	50,353	.7305	$ 36,781	.6960	$ 35,048	$ 1,733
1/2 Gals. Homo	251,507	.3645	91,676	.3480	87,533	4,143
Qts. Homo	63,076	.1907	12,029	.1810	11,423	606
Qts. Chocolate	13,919	.2403	3,345	.2330	3,241	104
1/2 Gals. Buttermilk	20,124	.3643	7,332	.3544	7,124	208
Qts. Buttermilk	30,957	.1893	5,859	.1810	5,599	260
1/2 Gals. 2%	97,725	.3347	32,708	.3230	31,564	1,144
1/2 Gals. Skim	25,116	.3306	8,303	.3080	7,731	572
Qts. Skim	15,600	.1789	2,791	.1695	2,652	139
1/2 Pts. Whip Cream	29,588	.2882	8,528	.2813	8,320	208
Pts. Half & Half	58,725	.2807	16,484	.2570	15,097	1,387
			$ 225,836		$ 215,332	$ 10,504

37 D

Prices as of May 8

ZONE IV

Miscellaneous Area

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost	A & P Label Unit Cost (Average)	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	158,479	.6866	$ 108,819	.6546	$ 103,740	$ 5,079
1/2 Gals. Homo	723,095	.3501	253,188	.3286	237,623	15,565
Qts. Homo	141,908	.1837	26,069	.1708	24,232	1,837
Qts. Chocolate	23,487	.2325	5,460	.2118	4,975	485
1/2 Gals. Buttermilk	30,264	.3580	10,833	.3316	10,036	797
Qts. Buttermilk	52,468	.1843	9,672	.1721	9,031	641
1/2 Gals. 2%	124,193	.3232	40,144	.3045	37,821	2,323
1/2 Gals. Skim	30,663	.3273	10,036	.2945	9,031	1,005
Qts. Skim	27,109	.1707	4,628	.1567	4,247	381
1/2 Pts. Whip Cream	48,967	.2917	14,283	.2623	12,844	1,439
Pts. Half & Half	156,381	.2742	42,883	.2462	38,497	4,386
			$ 526,015		$492,077	$ 33,938

37E

ZONE V

Rock Island Area

Prices as of May 8

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost	A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	148,911	.6066	$ 90,324	.5872	$ 87,447	$ 2,877
1/2 Gals. Homo	255,840	.3035	77,636	.2938	75,175	2,461
Qts. Homo	106,652	.1710	18,235	.1661	17,715	520
Qts. Chocolate	15,600	.1933	3,016	.1883	2,947	69
Qts. Buttermilk	28,617	.1714	4,905	.1666	4,767	138
1/2 Gals. 2%	87,013	.2743	23,868	.2646	23,019	849
1/2 Gals. Skim	37,613	.2627	9,880	.2531	9,516	364
Qts. Skim	22,985	.1573	3,553	.1523	3,432	121
1/2 Pts. Whip Cream	23,157	.2717	6,292	.2671	6,188	104
Pts. Half & Half	86,216	.2445	21,077	.2399	20,679	398
			$ 258,786		$ 250,885	$ 7,901

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THE BORDEN COMPANY

CENTRAL DIVISION

Estimate of Gross Profit Loss

Re: Chicago Metropolitan Region's Operation

Based on Loss of A & P's Fluid Milk Business

Total A & P Fluid Milk Point Sales - 6th Period	3,356,772
Total Gross Margin Contribution Per Point - Wholesale Route Sales (Based on analysis made 5th period)	.0632
Deduct: Estimated Reduction in Direct Cost if A & P Volume Was Lost	
Route Salesmen's Salaries & Commission	.0171
Route Salesmen's Fringe Benefits	.0037
Loading Expense	.0051
Truck Expense	.0049
Total Direct Cost Reduction Per Point	.0308
Estimated Reduction in Gross Profit Per Point	.0324
Estimate Amount of Reduction in Gross Profit	
(3,356,772 x $.0324 =)	$108,759
Add: Loss in Plant Fixed Cost Absorbation	21,349
(3,356,772 x $.00636 - Woodstock Fixed Cost)	
Total Estimated Reduction in Gross Profit	$130,108
	x 12
	$1,561,301

Note: The estimated reduction in gross profit indicated above is the equivalent of $1,691,404 annually, which compares to the private label price reduction quoted of $410,009.

8/16/65

THE BORDEN COMPANY
CENTRAL DIVISION

COMPARISON OF CLASS I BASIC MILK PRICE PER CWT.

JUNE - AUGUST, 1965

Area and Order No.	June	August	Increase
Chicago - Federal Order 30 - Superpool Area	$4.32	$4.32	-
Chicago - Federal Order 30 - Non-Superpool Area	3.78	4.17	$ .39
Rockford - Federal Order 38 - Superpool	4.00	4.09	.09
Milwaukee - Federal Order 39 - Superpool	4.20	4.20	-
Milwaukee - Federal Order 39 - Non-Superpool	3.66	4.05	.39
Rock Island - Federal Order 63 - Non-Superpool	3.88	4.27	.39
Marshalltown - Federal Order 78 - Non-Superpool	3.83	4.22	.39
Des Moines - Federal Order 79 - Non-Superpool	4.17	4.56	.39

8/16/65

THE BORDEN COMPANY
CENTRAL DIVISION

ANALYSIS OF PRODUCTION EXPENSE
WOODSTOCK, ILLINOIS PLANT

5TH PERIOD - 1965

	Total	Allocated to Variable	Fixed
Wage Costs	$107,273	$ 75,975	$31,298
All Other Costs	69,905	19,759	50,146
Total	$177,178	$ 95,734	$81,444
Per Cent to Total	100.00	54.03	45.97 ✓
Points Produced	12,809,895		
Average Per Point Produced	.01383	.00747	.00636

8/16/65

THE BORDEN COMPANY
CENTRAL DIVISION

DATA - RE: A & P SALES - FLUID MILK
BASED ON 6TH PERIOD ENDED JUNE 26

(1) Percentage of A & P Sales to Total Sales - Central Division - Points Sold

Region	Total A&P Volume	Central Division Sales: Grand Total	Central Division Sales: Wholesale Rte. Sales Only	Percent of A&P Sales To: Grand Total	Percent of A&P Sales To: Wholesale Rte. Sales
Chicago Metropolitan	3,356,772	13,291,969	(1)6,027,418	25.2	55.7
Eastern Iowa-Central Illinois	743,085	4,248,423	2,580,398	17.5	28.8
Western Iowa	9,618	3,254,249	771,840	.3	1.2
Wisconsin	851,751	8,755,366	3,536,438	9.7	24.1
Grand Total	4,961,226	29,550,007	12,916,094	16.8	38.4

(1) Excludes bulk route sales of 1,209,267 points.

(2) Percentage of A & P Sales Produced at Woodstock to Total Woodstock Production - Points

Total A & P Sales Produced at Woodstock	3,199,956
Total Woodstock Production	12,622,079
Percent of A & P Sales Produced at Woodstock to Total Woodstock Production	25.3%

687a

EXECUTIVE OFFICES: 251 NORTH WELLS STREET CHICAGO, ILLINOIS 60606 TELEPHONE 312: 645-6222

August 31, 1965

Mr. E. R. Schmidt, Buyer
The Great Atlantic & Pacific Tea Co., Inc.
Middle West Division
2622 North Pulaski Road
Chicago, Illinois 60639

Dear Mr. Schmidt:

Thank you for the opportunity to offer our price quotations according to your specifications. They are attached herewith for the following areas on fluid milk products only. (Cottage Cheese, separate.)

These quotations were developed by our accountants on an estimated total dollar volume of approximately one million dollars per month (26 delivery days) using Chicago list prices. A substantial increase or decrease in the size of your order (compared to the assumption of dollar volumes set forth above) would affect these prices and I would appreciate an opportunity to discuss with you a) the areas involved b) the dollar volume and c) the resultant prices.

AREA:

1. Metropolitan Chicago
2. Northwestern Illinois
3. North Central Illinois
4. Indiana
5. Iowa

Each bid on the above areas consists of the following substantiating materials:

1. Map Indicating Location of Stores
2. Cost Plus Pricing Schedule for the Bowman Label and the A & P Label Brands
3. Standard Direct Product Cost - Chicago Plant
4. Selling and Delivery Expenses - Per Route Day

FLORIDA: ST. PETERSBURG • IOWA: DAVENPORT • INDIANA: NEW ALBANY, TERRE HAUTE
MICHIGAN: SAGINAW • OHIO: CLEVELAND, COLUMBUS • WISCONSIN: CHIPPEWA FALLS, DELAFIELD, RACINE, TOMAH

B

Mr. E. R. Schmidt August 31, 1965

These price quotations would only change as follows:

1. Increase or decrease in Federal Fluid Milk Market Order.
2. Increase or decrease in container costs.
3. Labor increases.

Costs not considered in these quotations are as follows:

1. Return of out-dated or sour merchandise.
2. Merchandising of stores and point-of-sale materials.
3. Call-backs (straight-line delivery service only was considered).

I am enclosing a history of the period of time that we served the A & P Company. This substantiates that we contributed to A & P's progress for the last eleven years that we had the privilege of servicing your stores.

We are looking forward to a resumption of business with your fine corporation in the very near future.

Sincerely,

Frank T. Cannon Sr

FTC:rt
enc.

Frank T. Cannon, Sr.
General Manager - Wholesale

3

PRICE ESCALATION ON MILK ORDER PRICES

Chicago area prices are quoted on the basis of the present Order Number 30 price plus a super pool which totals $4.32 per CWT. for 3.5% Class I Milk Products.

Iowa area prices are quoted on the basis of Order Number 63 price plus a super pool which totals $4.37 per CWT. for 3.5% Class I Milk Products.

Each change of 5 cents per CWT. will increase or decrease quoted prices by 1/8 cent per point for each product.

In the event that stores are served in areas where there is no Federal Milk Order or where the super pool price is not effective, we will adjust quoted prices in that area.

LABOR PRICES

Quoted prices will be adjusted for any changes in Union labor rates or changes in Federal Payroll taxes.

Container Costs

Quoted prices will be adjusted for any changes in the purchase cost for containers used.

1/

AREA MAP A

D

METROPOLITAN CHICAGO AREA

SECTION	'STORES
Far North	8
Near North	17
Northwest	9
Far West	12
Near West	14
Joliet	7
South	12
Chicago	96
Total	175



Chicago, Ill.
97
35
62
90
80
GARY
GARY PARK
DIVISION STREET
OAK PARK
BERWYN
CICERO
AUSTIN
LAWNDALE
HUMBOLDT PARK
WEST TOWN
NEAR WEST
NEAR NORTH
LINCOLN PARK
NEAR NORTH
EDGEWATER
ROGERS PARK
WEST RIDGE
NORTH TOWN
WEST ELSDON
GAGE PARK
HYDE PARK
KENWOOD
OAKLAND
GRAND BOULEVARD
DOUGLAS
NORTH KENWOOD
OAKLAND
FULLER PARK
GRAND BOULEVARD
KENWOOD
WASHINGTON PARK
WOODLAWN
SOUTH SHORE
SOUTH CHICAGO
BURNSIDE
CALUMET HEIGHTS
AVALON PARK
SOUTH CHICAGO
SOUTH DEERING
EAST SIDE
HEGEWISCH
WEST PULLMAN
RIVERDALE
ROSELAND
PULLMAN
ROSELAND

AREA A

STORES IN METROPOLITAN CHICAGO AREA

FAR NORTH REGION	
ANTIOCH	1
FOX LAKE	1
LIBERTYVILLE	1
MUNDELEIN	1
WAUKEGAN	3
ZION	1
TOTAL	8

NEAR NORTH REGION	
DES PLAINES	1
EVANSTON	4
GLENVIEW	1
HIGHLAND PARK	1
HIGHWOOD	1
LAKE BLUFF	1
LAKE FOREST	1
NILES	1
NORTHBROOK	1
PARK RIDGE	1
SKOKIE	2
WILMETTE	1
WINNETKA	1
TOTAL	17

NORTHWEST REGION	
ARLINGTON HTS.	2
BARRINGTON	1
DUNDEE	1
ELGIN	1
MT. PROSPECT	1
PALATINE	1
SCHUMBURG	1
WAUCONDA	1
TOTAL	9

NEAR WEST REGION	
BERWYN	2
BROOKFIELD	1
CICERO	3
FRANKLIN PARK	1
LA GRANGE	1
MAYWOOD	1
NORRIDGE	1
OAK PARK	3
WESTERN SPRINGS	1
TOTAL	14

FAR WEST REGION	
AURORA	2
BATAVIA	1
BENSENVILLE	1
DOWNERS GROVE	1
ELMHURST	1
GLEN ELLYN	1
LOMBARD	1
NAPERVILLE	1
ST. CHARLES	1
VILLA PARK	1
WHEATON	1
TOTAL	12

JOLIET REGION	
JOLIET	6
LOCKPORT	1
TOTAL	7

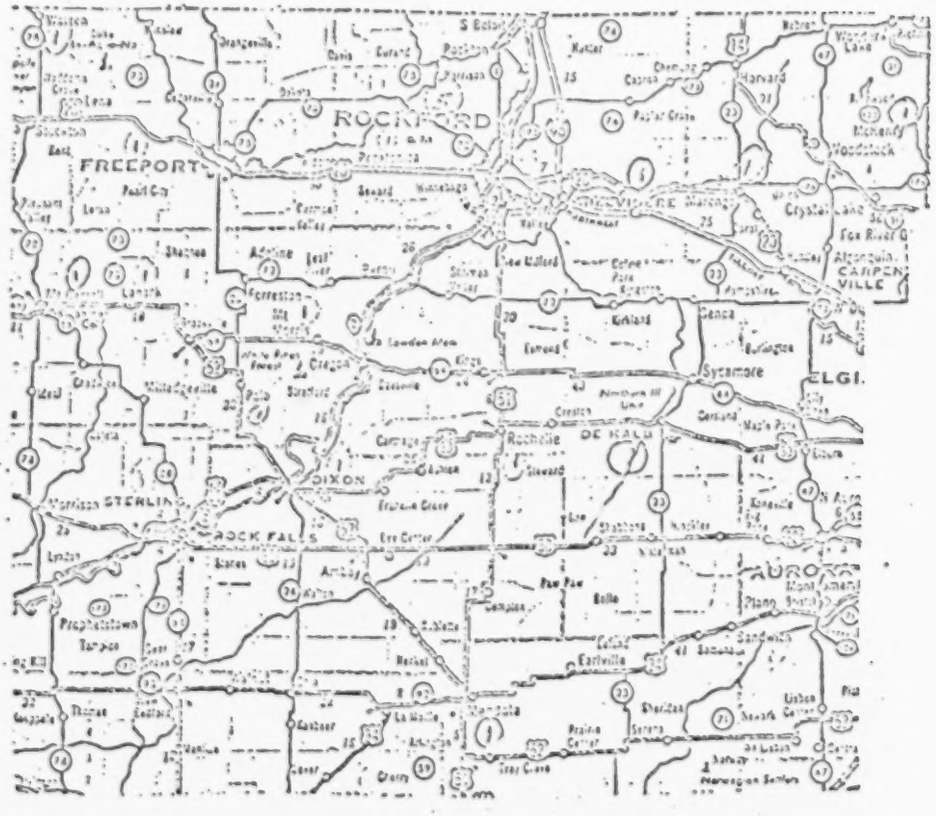
SOUTH REGION	
BLUE ISLAND	1
CHICAGO HTS.	2
CHICAGO RIDGE	1
DOLTON	1
EVERGREEN PARK	1
HARVEY	1
HOMEWOOD	1
MIDLOTHIAN	1
OAK LAWN	1
RICHTON PARK	1
SUMMIT	1
TOTAL	12

CITY OF CHICAGO REGION	
TOTAL	96

G

STORES IN
NORTHWESTERN ILLINOIS

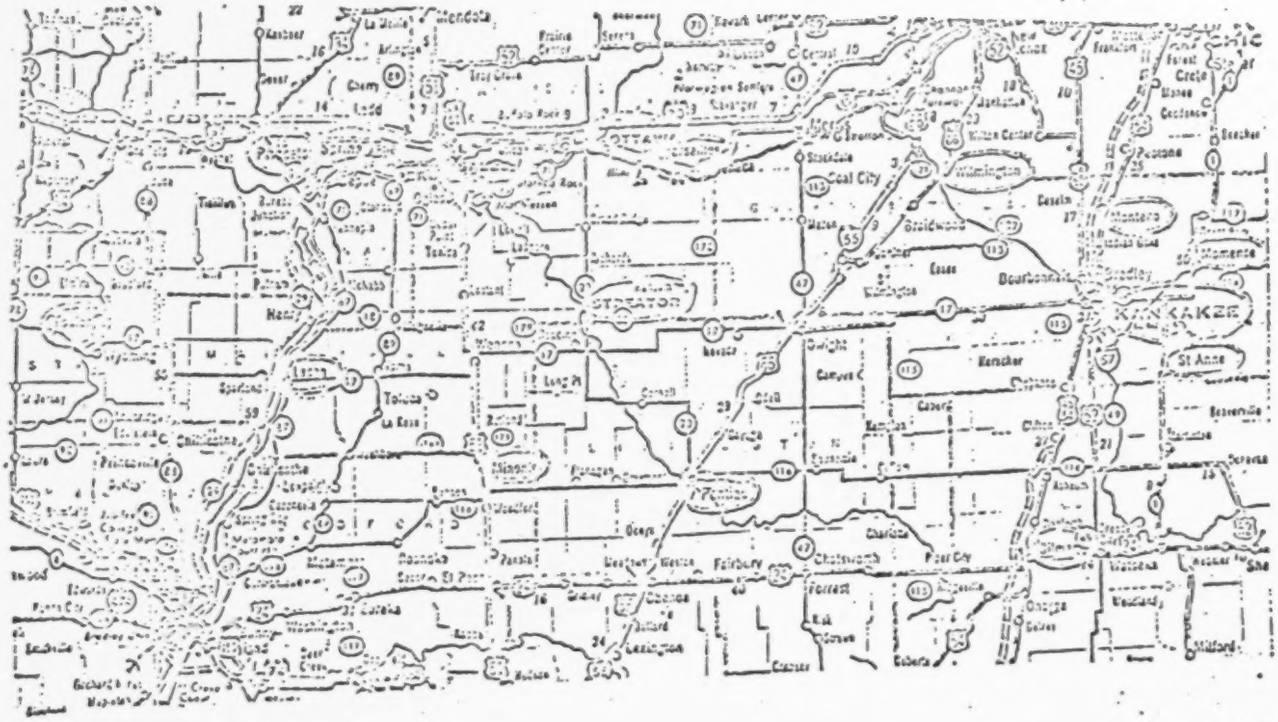
Crystal Lake	1
Warren	1
Freeport	1
Pecatonica	1
Rockford	5
Loves Park	1
Belvidere	1
Marengo	1
Woodstock	1
McHenry	1
Mt. Carroll	1
Lanark	1
Mt. Morris	1
Polo	1
Sterling	1
Dixon	1
Rochelle	1
DeKalb	1
Mendota	1
Sandwich	1
Total	24



AREA MAP D

NORTH CENTRAL ILLINOIS

Gilman	1
Kankakee	2
Manteno	1
LaSalle	1
Ottawa	1
Pontiac	1
Streator	1
Momence	1
Wilmington	1
Marseilles	1
Minonk	1
St. Anne	1
Toulon	1
Lacon	1
Spring Valley	1
Princeton	1
	17



R-36 — 5/31/65

EXHIBIT A

VET PRICES – METROPOLITAN CHICAGO – NORTHWESTERN AND NORTH CENTRAL ILLINOIS

695a

STORE SERVICE SIX DAYS WEEKLY

3393

	SCHEDULE 1 DIRECT COST FOB CHICAGO AREA PLANT	MARKUP *	NET PRICE AT CHICAGO AREA PLANT	DIRECT VANNING COST TO SALES AREA	Direct Cost of delivery per point	COMMISSION	NET DELIVERED PRICE SIX DAY RT.
. HOMO. V.D.	.1302	.0081	.1383	.0025	.0206	.0082	.1696
GAL. HOMO. V.D. (GLASS)							
GAL. HOMO. V.D. (FIBER)	.2390	.0119	.2509	.0051	.0412	.0164	.3136
L. HOMO. V.D. -GLASS	.4402	.0252	.4654	.0146	.0824	.0328	.5952
AL. HOMO. V.D. - FIBER	.4878	.0141	.5019	.0101	.0824	.0328	.6272
S. EGG-CAL							
. SOURED HALF & HALF	.2385	.0275	.2660	.0028	.0206	.0082	.2976
. HALF & HALF	.2014	.0180	.2194	.0014	.0206	.0082	.2496
S. RICH CREAM							
. RICH CREAM							
PT. RICH CREAM							
S. WHIP CREAM							
PT. WHIP CREAM	.2083	.0180	.2263	.0009	.0206	.0082	.2560
LICK-WHIP" DISPENSER	.2742	.0353	.3095	.0009	.0206	.0082	.3392
DOI WIP" DISPENSER.	.4075	.0178	.4253	.0009	.0206	.0082	.4550
OCTOSH MILFIID - PTS.	.1445	.0109	.1554	.0014	.0206	.0082	.1856
S. SOUR CREAM	.3001	.0375	.3376	.0112	.0412	.0164	.4064
2 PTS. SOUR CREAM /	.1486	.0250	.1736	.0056	.0206	.0082	.2080
2 GAL. BUTTERMILK	.2259	.0250	.2509	.0051	.0412	.0164	.3136
S. BUTTERMILK	.1003	.0156	.1159	.0025	.0206	.0082	.1472
'S. DARI-RICH /	.1617	.0150	.1767	.0025	.0206	.0082	.2080
2 PTS. DARI-RICH CARRY-PACK							
2 PTS. CHOCOLATE SHAKE	.0591	.0095	.0686	.0009	.0052	.0021	.0768
2 GAL. STA-FIT	.2131	.0250	.2381	.0051	.0412	.0164	.3008
. STA-FIT	.1163	.0156	.1319	.0025	.0206	.0082	.1632
2 GAL. 2%	.2106	.0211	.2317	.0051	.0412	.0164	.2944
OGURT (Plain & Strawberry)	.1425	.0006	.1431	.0009	.0206	.0082	.1728
NACK DIP - 5oz.	.2458	.0045	.2503	.0009	.0206	.0082	.2800

CLASS I PRICE – 4.32 per CWT.

* Overhead & profit (approx 6%)

36-8-31-65
696a

SCHEDULE 1

STANDARD DIRECT PRODUCT COSTS — CHICAGO PLANTS

	Raw Merchandise Cost FOB Chicago Plan	Bottling Plant Labor and Expense	Containers	Total Direct Costs FOB Chicago Plant
QTS. HOMO. V.D.	.0926	.0154	.0162	.1302
1/2 GAL. HOMO. V.D. (GLASS)				
1/2 GAL. HOMO. V.D. (FIBER)	.1971	.0129	.0290	.2390
GAL. HOMO. V.D. - GLASS	.3942	.0277	.0181	.4402
GAL HOMO V.D - FIBER	.3942	.0321	.0615	.4878
QTS. LOW-CAL				
PTS. SOURED HALF & HALF	.1202	.0690	.0493	.2385
PTS. HALF & HALF	.1201	.0698	.0115	.2014
QTS. RICH CREAM			-	
PTS. RICH CREAM			-	
1/2 PT. RICH CREAM			-	
QTS. WHIP CREAM			-	
1/2 PT. WHIP CREAM	.1489	.0505	.0089	.2083
"QUICK-WHIP" DISPENSER	.2717	.0025	-	.2742
"REDDI WIP" DISPENSER	.4050	.0025	-	.4075
BOSTON BLEND PINTS	.1420	.0025	-	.1445
PTS. SOUR CREAM	.1666	.0724	.0431	.3001
1/2 PTS. SOUR CREAM	.0833	.0305	.0288	.1426
1/2 GAL. BUTTERMILK	.1301	.0668	.0290	.2259
QTS. BUTTERMILK	.0651	.0190	.0162	.1003
QTS. DARI-RICH	.1043	.0312	.0162	.1617
1/2 PTS. DARI-RICH CARRY PACK				
1/2 PTS. CHOCOLATE SHAKE	.0403	.0089	.0099	.0591
1/2 GAL. STA-FIT	.1312	.0529	.0290	.2131
QT. STA-FIT	.0656	.0345	.0162	.1163
1/2 GAL. 2%	.1672	.0414	.0290	.2376
YOGURT (Plain & Strawberry)	.1400	.0025	-	.1425
SNACK DIP - 8 oz	.2433	.0025	-	.2458

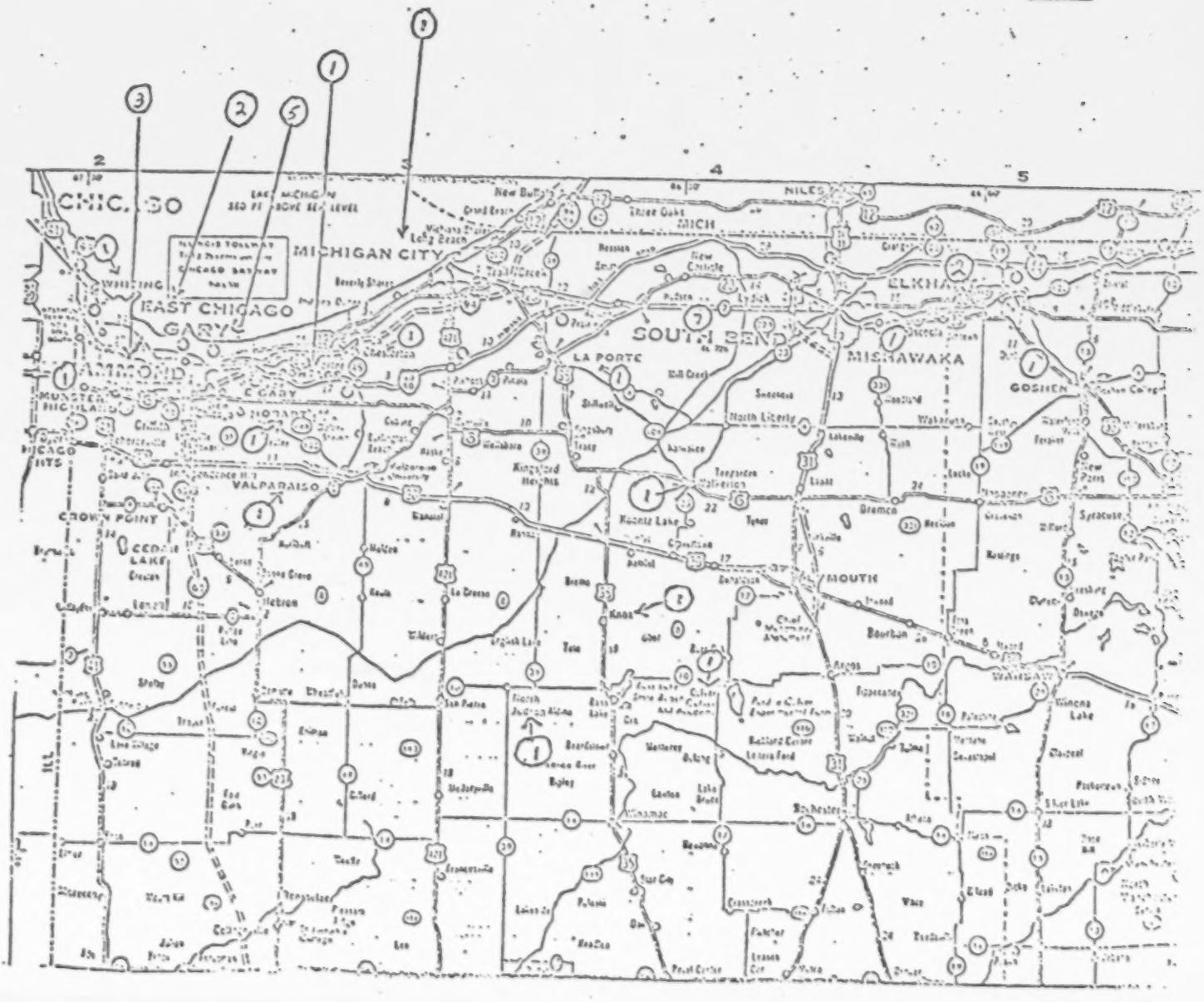
CLASS I PRICE — 4.32 PER CWT.

AREA MAP B

K

INDIANA STORES

WEST		EAST	
Whiting	1	North Judson	1
Hammond	3	La Porto	1
Munster	1	Walkerton	1
E. Chicago	2	Knox	1
Gary	6	South Bend	8
Michigan City	1	Culver	1
Portage	1	Mishawaka	1
Hobart	1	Elkhart	2
Valparaiso	1	Goshen	1
Chesterton	1		
	18		17



#36 — 3/31/65

698a

EXHIBIT 6

NET PRICES-INDIANA AREA

STORE SERVICE THREE DAYS WEEKLY

	Schedule 1 Direct Cost F.O.B. Chicago Area Plant	Markup	Net Price at Chicago Area Plant	Direct Vanning Cost to Sales Area	Direct Cost of delivery per point	Commission	Net Delivered Price-Three Days Weekly
QTS. HOMO. V.D.	.1302	.0081	.1383	.0055	.0134	.0052	.1624
1/2 GAL. HOMO. V.D. (GLASS)							
1/2 GAL. HOMO. V.D. (FIBER)	.2297	.0119	.2509	.0112	.0268	.0104	.2993
GAL. HOMO. V.D.- GLASS	.4503	.0353	.4654	.0331	.0536	.0205	.5719
GAL. HOMO. V.D.- FIBER	.4528	.0141	.5019	.0321	.0536	.0204	.5264
QTS. LOW-CAL							
PTS. SOURED HALF & HALF	.2385	.0225	.2660	.0061	.0134	.0052	.2907
PTS. HALF & HALF	.2014	.0150	.2194	.0061	.0134	.0052	.3441
QTS. RICH CREAM							
PTS. RICH CREAM							
1/2 PT. RICH CREAM							
QTS. WHIP CREAM							
1/2 PT. WHIP CREAM	.2083	.0180	.2263	.0020	.0134	.0052	.3338
"QUICK-WHIP" DISPENSER	.2762	.0353	.3065	.0020	.0134	.0052	.3301
"FOOD WHIP" DISPENSER	.4025	.0178	.4253	.0020	.0134	.0052	.4459
BOSTON BLEND - PTS	.1445	.0109	.1554	.0031	.0134	.0052	.1771
PTS. SOUR CREAM	.3001	.0375	.3376	.0183	.0264	.0104	.3931
1/2 PTS. SOUR CREAM	.1486	.0250	.1736	.0117	.0134	.0052	.2039
1/2 GAL. BUTTERMILK	.2259	.0250	.2509	.0112	.0264	.0104	.2993
QTS. BUTTERMILK	.1003	.0156	.1159	.0055	.0134	.0052	.1400
QTS. DAN-RICH	.1617	.0150	.1767	.0055	.0134	.0052	.2008
1/2 PTS. DAN-RICH CARRY PACK							
1/2 PTS. CHOCOLATE SHAKE	.0591	.0095	.0686	.0020	.0034	.0013	.0753
1/2 GAL. STA-FIT	.3131	.0250	.3381	.0112	.0264	.0104	.2265
QT. STA-FIT	.1153	.0166	.1319	.0055	.0134	.0052	.1560
1/2 GAL. 2%	.2106	.0211	.2317	.0112	.0268	.0104	.2901
YOGURT (Plain & Strawberry)	.1425	.0006	.1431	.0020	.0134	.0052	.1637
SNACK DIP - 8 OZ.	.2458	.0045	.2503	.0020	.0134	.0052	.2709

CLASS I PRICE — 4.32 per CWT.

L

13

698a-1 AREA MAP E

STORES IN IOWA REGION

Independence	1
Dyersville	1
Cedar Rapids	1
Clinton	1
Davenport	2
Dubuque	2
Moline, Ill.	2
Waterloo	2
Cedar Falls	1
Savanna, Ill.	1
Rock Island, Ill.	1
Iowa City	1
Geneseo, Ill.	1
Galesburg	2
Total	21



M

Last Column represents grants on A & P

Diff of approx $3,000.- private Label & A & P

Admiss & other Claims passing

15

N

— 9/23/65

EXHIBIT C-1

IOWA AREA — 3 DAY DELIVERY

	LIST PRICE		NET PRICE	
	COMPANY BRAND	PRIVATE LABEL	COMPANY BRAND	PRIVATE LABEL
QTS. HOMO. V.D.	.25	.2425	.1850	.1795	.1624
1/2 GAL. HOMO. V.D. (GLASS)					
1/2 GAL. HOMO. V.D. (FIBER)	.45	.4350	.3330	.3219	.2993
GAL. HOMO. V.D. - GLASS	.80		.5920		.5719
GAL. HOMO. V.D. - FIBER	.90	.87	.6660	.6438	.5984
QTS. BOW-CAL					
PTS. SOURED HALF & HALF	.44		.3256		.2907
PTS. HALF & HALF	.35		.2590		.2441
QTS. RICH CREAM					
PTS. RICH CREAM					
1/2 PT. RICH CREAM					
QTS. WHIP CREAM					
1/2 PT. WHIP CREAM	.40	.39	.2960	.2886	.2469
"QUICK-WHIP" DISPENSER					
"FREDDI WIP" DISPENSER					
GALS 2% - FIBER	.84	.81	.6216	.5994	.5544
PTS. SOUR CREAM	.55		.4070		.3931
1/2 PTS. SOUR CREAM	.31		.2294		.2039
1/2 GAL. BUTTERMILK		.445		.3293	.2993
QTS. BUTTERMILK	.255	.2475	.1887	.1832	.1400
QTS. DARI-RICH WHOLE MILK	.285	.2775	.2109	.2054	.1881
1/2 PTS. DARI-RICH CARRY PACK					
1/2 PTS. CHOCOLATE SHAKE				.0768	.0753
1/2 GAL. STA-FIT	.395	.38	.2923	.2812	.2865
QT. STA-FIT	.23	.225	.1702	.1665	.1560
1/2 GAL. 2%	.42	.405	.3108	.2997	.2801
YOGURT (Plain & Strawberry)	.255		.1887	.1728	.1637
SNACK DIP 8 OZ.				.28	.2709
DISPOSABLE 1/2 GAL FRUIT DR	37		.2738		.2443

Milk Order Price 4.27 per CWT

Super Pool .10

36 – 8/31/65

IOWA AREA – 2 GAL DELIVERY

701a

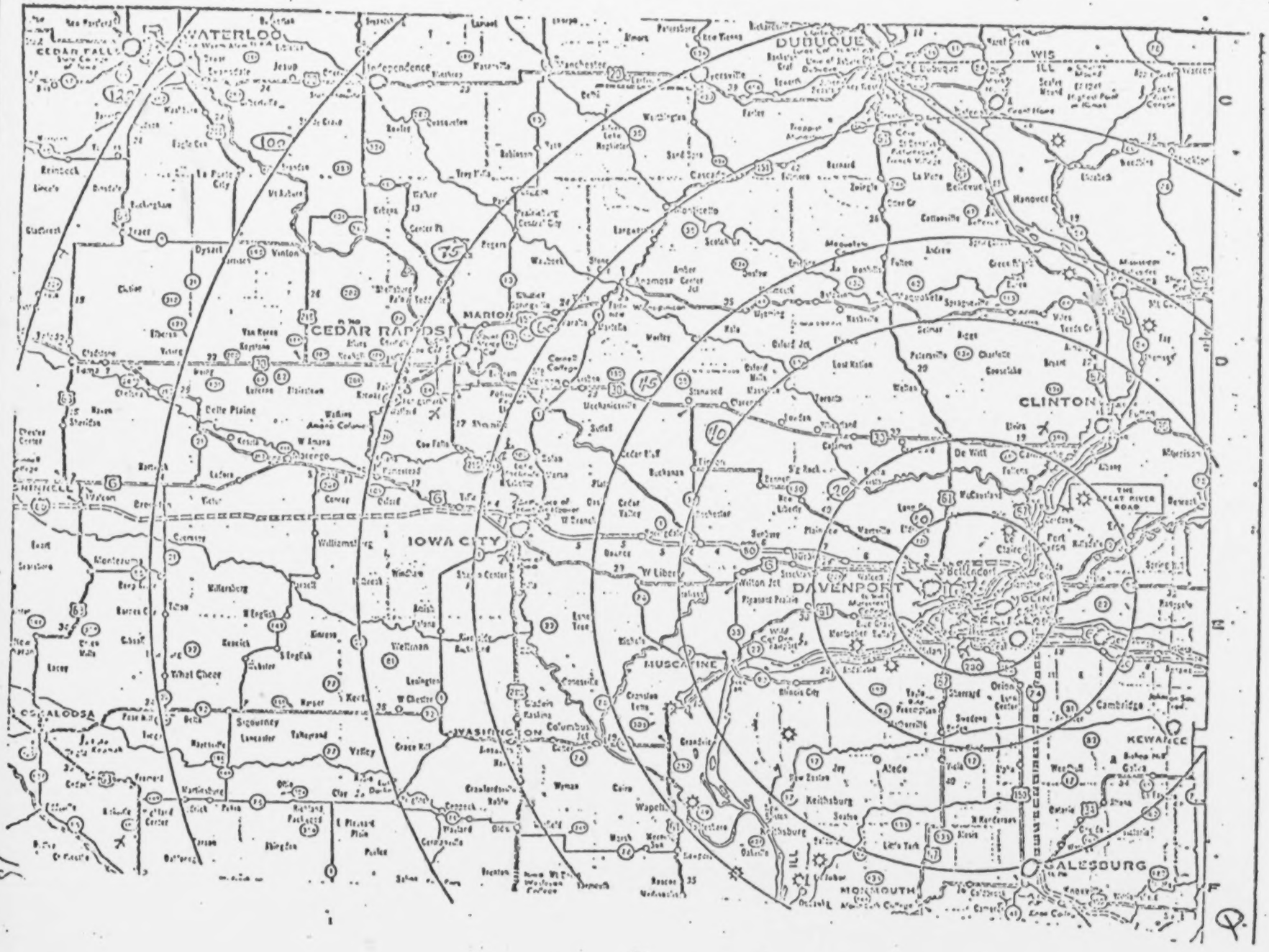
BOWMAN DAIRY COMPANY PRICES ON FILE WITH THE IOWA MILK COMMISSION

	LIST PRICE				NET PRICE	
	COMPANY BRAND	PRIVATE LABEL			COMPANY BRAND	PRIVATE LABEL
QTS. HOMO. V.D.	.25	.2425			.1850	.1795
1/2 GAL. HOMO. V.D. (GLASS)						
1/2 GAL. HOMO. V.D. (FIBER)	.45	.4350			.3330	.3219
GAL. HOMO. V.D. – GLASS	.80				.5920	
GAL. HOMO V.D. – FIBER	.90	.87			.6660	.6438
QTS. BOW-CAL						
PTS. SOURED HALF & HALF	.44				.3256	
PTS. HALF & HALF	.35				.2590	
QTS. RICH CREAM						
PTS. RICH CREAM						
1/2 PT. RICH CREAM						
QTS. WHIP CREAM						
1/2 PT. WHIP CREAM	.40	.39			.2960	.2886
"QUICK-WHIP" DISPENSER						
"REDDI WIP" DISPENSER						
GALS 2% – FIBER	.84	.81			.6216	.5994
PTS. SOUR CREAM	.55				.4070	
1/2 PTS. SOUR CREAM	.31				.2294	
1/2 GAL. BUTTERMILK		.445				.3293
QTS. BUTTERMILK	.255	.2475			.1887	.1832
QTS. DARI-RICH – WHOLE MILK	.285	.2775			.2109	.2053
1/2 PTS. DARI-RICH CARRY PACK						
1/2 PTS. CHOCOLATE SHAKE						
1/2 GAL. STA-FIT	.395	.38			.2923	.2812
QT. STA-FIT	.23	.225			.1702	.1665
1/2 GAL. 2%	.42	.405			.3108	.2997
YOGURT (Plain & Strawberry)	.255				.1887	
SNACK DIP						
[illegible] ½ GAL FRUIT DR	.37				.2738	
QTS. STRAWBERRY DRINK						
PKS. CREAM COTTAGE CHEESE – 8 OZ.						
PKGS. CREAM COTT. CHS. – 16 OZ.						
PKGS. CREAM COTT. CHS. – 32 OZ.						
PKGS. CHIVE COTT. CHS. – 16 OZ.						
PKGS. PINEAPPLE COTT. CHS. 16 OZ.						
PKGS. BAKERS COTT. CHS. – 16 OZ.						
SNACK DIP 8 OZ.						
1/2 GAL. FRUIT DRINKS						

MILK ORDER PRICE 4.27 CWT

SUPER POOL .10

IOWA AREA MAP E-1



#36 — 8/31/65

EXHIBIT D

703a

NET DELIVERED PRICES

	Standard List Price to Chain Store	Net Price: All Stores	Net Price: 70% of Stores	Net Price: 50% of Stores
QTS. HOMO. V.D.	.265	.1696	.1742	.1749
1/2 GAL. HOMO. V.D. (GLASS)				
1/2 GAL. HOMO. V.D. (FIBER)	.49	.3136	.3223	.3234
GAL. HOMO. V.D. – GLASS	.93	.5952	.6115	.6138
GAL Homo V.D - FIBER	.98	.6272	.6444	.6468
QTS. BOW-CAL				
PTS. SOURED HALF & HALF	.465	.2976	.3057	.3069
PTS. HALF & HALF	.39	.2496	.2564	.2574
QTS. RICH CREAM				
PTS. RICH CREAM				
1/2 PT. RICH CREAM				
QTS. WHIP CREAM				
1/2 PT. WHIP CREAM	.410	.2560	.2630	.2640
"QUICK-WHIP" DISPENSER	.53	.3392	.3485	.3498
"REDDI WIP" DISPENSER X	.535	.4550	.4550	.4550
PTS Boston Blend	.29	.1856	.1907	.1914
PTS. SOUR CREAM	.635	.4064	.4175	.4191
1/2 PTS. SOUR CREAM	.325	.2080	.2137	.2145
1/2 GAL. BUTTERMILK	.49	.3136	.3222	.3234
QTS. BUTTERMILK	.23	.1472	.1512	.1518
QTS. DARI-RICH	.325	.2080	.2137	.2145
1/2 PTS. DARI-RICH CARRY PACK				
1/2 PTS. CHOCOLATE SHAKE	.12	.0768	.0789	.0792
1/2 GAL. STA-FIT	.47	.3008	.3090	.3102
QT. STA-FIT	.255	.1632	.1677	.1683
1/2 GAL. 2%	.461	.2944	.3025	.3036
YOGURT (Plain & Strawberry)	.27	.1723	.1775	.1782
SNACK DIP – 8 OZ X	.40	.2300	.2300	.2300

CLASS I PRICE – 4.32 per CWT

R

704a

BOWMAN DAIRY COMPANY

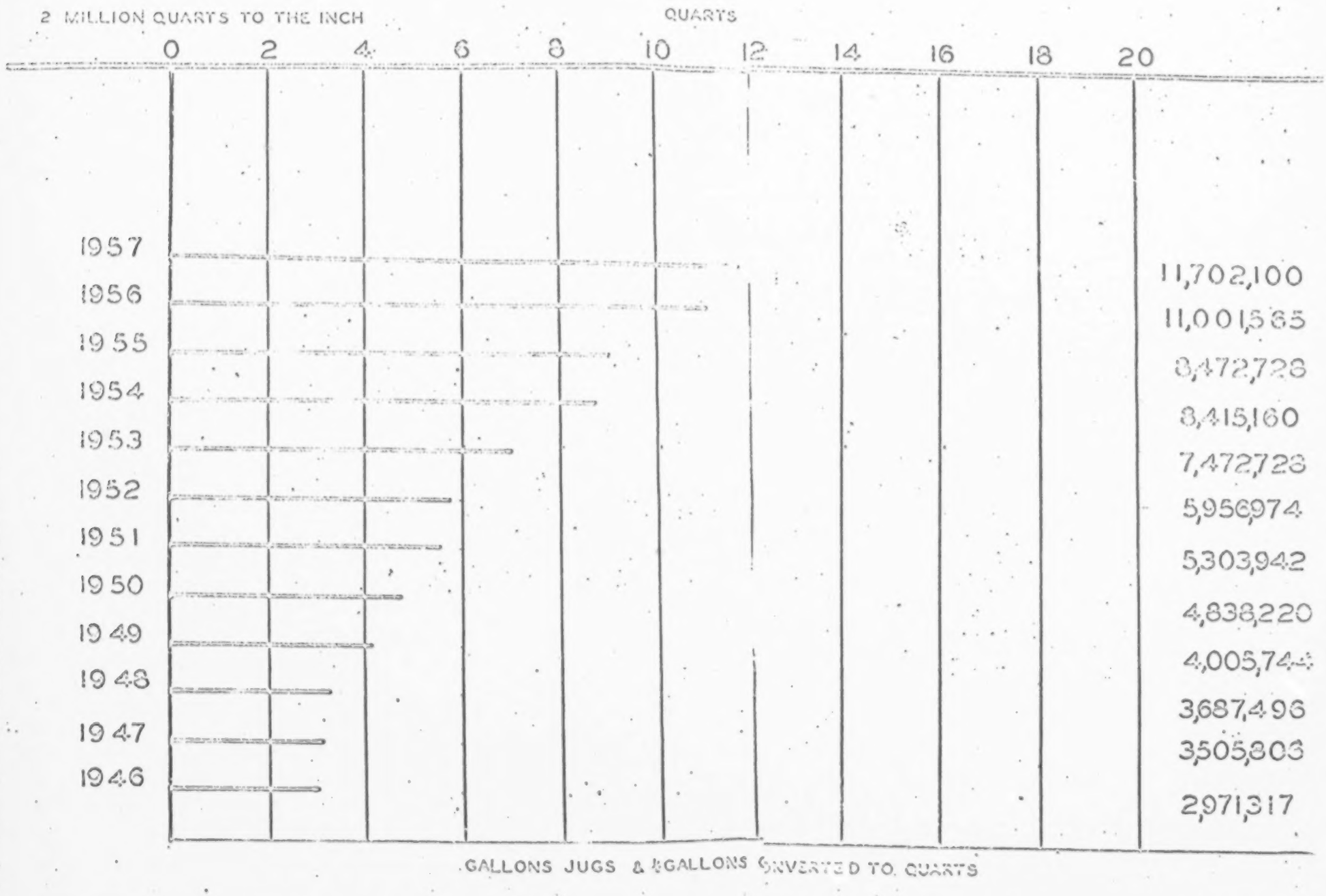
CHAIN STORE PRICE LIST EFFECTIVE [illegible] Price List Number [illegible]

ITEMS	CHAIN STORE Wholesale	For Billing Purposes Only Retail
Qts. Homo V.D.	[illegible]	[illegible]
1/2 Gal. Homo V.D. (Glass)	[illegible]	[illegible]
1/2 Gal. Homo V.D. (Fiber)	[illegible]	[illegible]
Gal. Homo V.D. (Glass)	[illegible]	[illegible]
Gal. Homo V.D. (Fiber)	[illegible]	[illegible]
Pts. Sour Half & Half	[illegible]	[illegible]
Pts. Half & Half	[illegible]	[illegible]
Pts. Rich Cream	[illegible]	[illegible]
1/2 Pts. Rich Cream	[illegible]	[illegible]
1/2 Pts. Whipping Cream	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
"Quick-Whip" Dispenser	[illegible]	[illegible]
"Reddi-Wip" Dispenser	[illegible]	[illegible]
"Top-Wip" Dispenser	[illegible]	[illegible]
Pts. Sour Cream	[illegible]	[illegible]
1/2 Pts. Sour Cream	[illegible]	[illegible]
1/2 Gal. Buttermilk	[illegible]	[illegible]
Qts. Buttermilk	[illegible]	[illegible]
Qts. Choc. Drink	[illegible]	[illegible]
1/2 Pts. Choc. Shake	[illegible]	[illegible]
1/2 Gal. Sta-Fit	[illegible]	[illegible]
Qts. Sta-Fit	[illegible]	[illegible]
1/2 Gal. 2%	[illegible]	[illegible]
Yogurt (Plain)	[illegible]	[illegible]
Yogurt (Strawberry)	[illegible]	[illegible]
Qts. Egg Nog (Glass)		
Qts. Egg Nog (Fiber)		
Egg Nog Mix 8 oz		
1/2 Gal. Fruit Drink		
Qts. Orange Drink		
Pkg. Cream Cottage Cheese 8 oz.	[illegible]	[illegible]
Pkg. " " " 16 oz.	[illegible]	[illegible]
Pkg. Chive " " 16 oz.	[illegible]	[illegible]
Pkg. Pineapple " " 16 oz.	[illegible]	[illegible]
Pkg. Bakers " " 16 oz.	[illegible]	[illegible]
Pkg. Cream " " 32 oz.	[illegible]	[illegible]
Thermo Mugs		
Snack Dip	[illegible]	[illegible]

Items Having Price Change Since Last Notification Are Marked "X"

705a 12-1

MILK



GALLONS JUGS & ½GALLONS CONVERTED TO QUARTS

33

706a

TOTAL UNITS SOLD

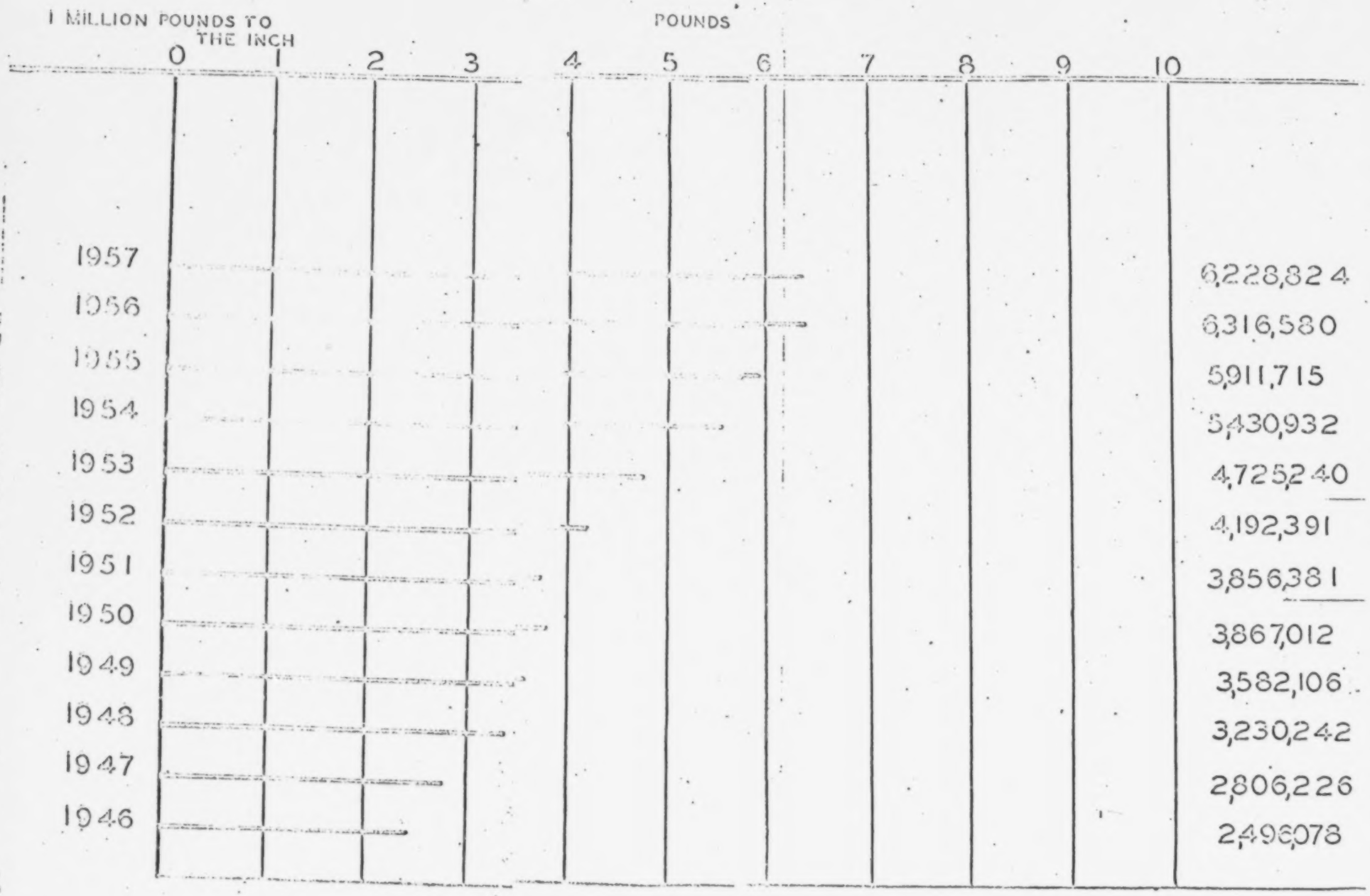
FOR 13 PERIOD OR 52 WEEKS

Acorn Milk Co. L.L.C.
Sought from Borden
for $1.00

YEAR	MILK	CREAM	BUTTERMILK	TOTAL	COTTAGE CHEESE
1957	11,702,100	3,510298	654,201	15,866,599	6,228,824
1956	11,001,565	3,603,192	540657	15150414	6316,580
1955	8,340443	3,103,336	35,627	12409,326	5,911,713
1954	8,418160	2,734,004	4176	11533340	5,430932
1953	7,472728	2435,627	19329	10257695	4,725,240
1952	5,956974	2,143,939	321,727	8422,640	4,192,391
1951	5,303942	2,104,218	322743	7,730903	3,856,381
1950	4,838220	2,132,793	196479	7,167,492	3,867,012
1949	4,005744	1,952,051	173349	6,131,144	3,582,106
1948	3,687496	1,905,284	138427	5731,207	3,230,242
1947	3,506806	1,830,276	140,162	5,476,244	2,086,226
1946	2,971,317	1,528,855	119,340	4619,512	2,496,078

7078

COTTAGE CHEESE



X

23

138

CX 53 A

5:10 p.m.

Door just Rock
Schmidt

R.R.M.
9/1/65
Phone calls to file

2 other quotes

Bauman } both substantially
Wanzer } below Bardens.

No help from A+P on these comp. quotes

Spec ~~formation~~ formation we do — if cost $50000.00 would not even close.

If Agreed eliminated our cost would be $ 90000

We are getting other bid

"Go back and figure out what the acct is worth to you"

53 B

Can wait until after
labor day

9/4/15 54 A

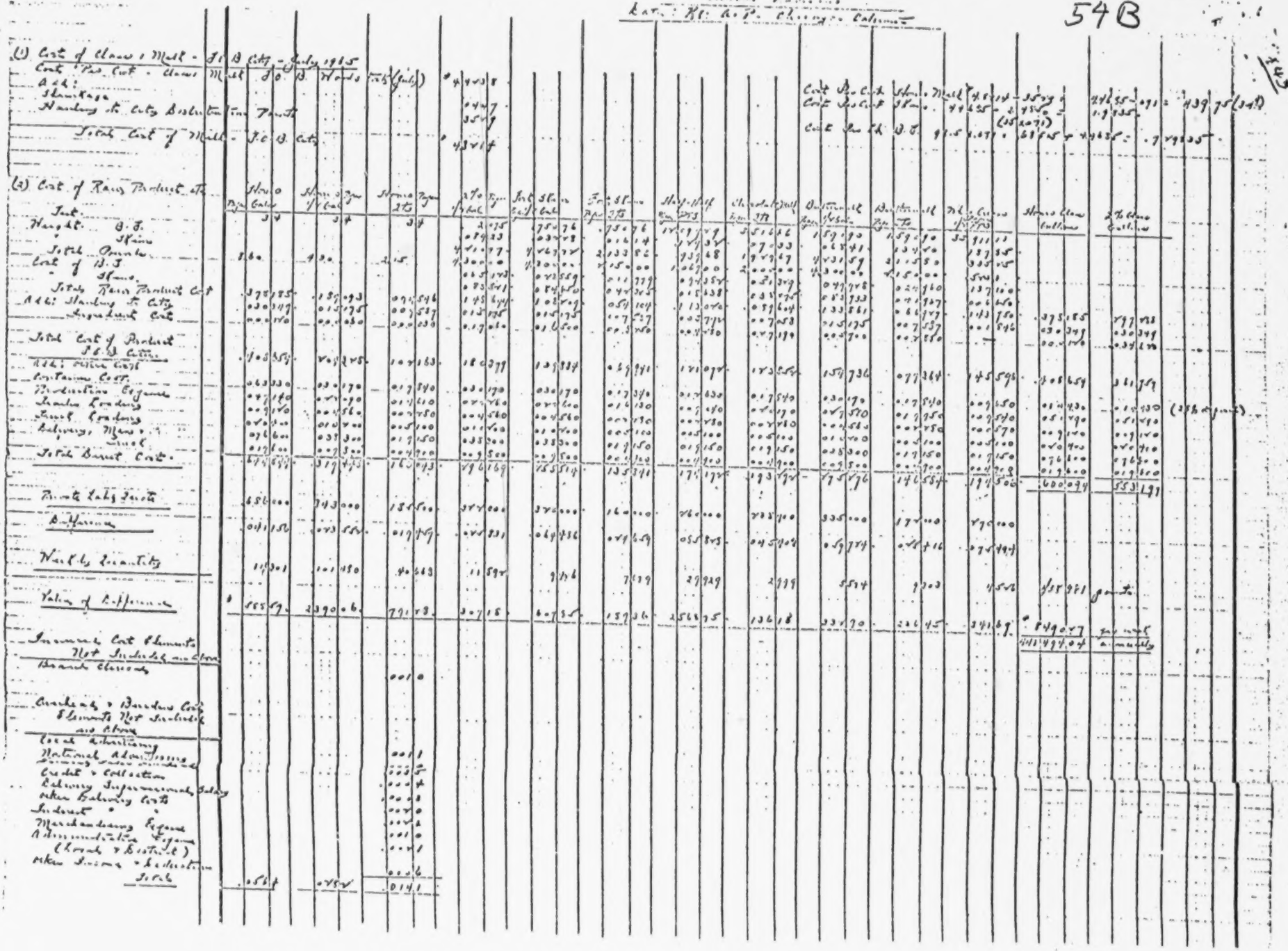
Re: A.P. Private Label
Development of Estimated Cost Data
and Comparisons of Unit
Costs With Best Quotations

CAD 54B

St. Paul Co.

54B

711a



September 14, 1965.

THE BORDEN COMPANY
Central Division

Price Quotation Data covering

A & P Private Label Fluid Milk Products

in

A & P Areas No. 1, 2, 3, 4 & 5.

713a

THE BORDEN COMPANY
Central Division

9-14-65

Summary of Estimated Annual Quotation Differentials

Area	Annual Value for Borden Label	Annual Value for A & P Label	Annual Quotation Differential
Zone #1-Chicago and Calumet	$5,134,934	$4,428,008	$706,926
Zone #2-South Bend Area	331,043	307,522	23,521
Zone #3-Rockford-Joliet Area	225,836	199,635	26,201
Zone #4-Miscellaneous Area	525,969	470,809	55,160
Zone #5-Rock Island Area	273,254	265,057	8,197
Total	$6,491,036	$5,671,031	$820,005

9-14-65

THE BORDEN COMPANY
Central Division

Estimated Annual Quotation Differentials - Zone #1 (Chicago-Calumet)

Item	Size	Annual Usage In Units	Borden Label Unit Prices Week 5-8-65	Annual Value for Borden Label	A&P Label Unit Quotations	Annual Value for A & P Label	Annual Differential
Homo V.D. Milk	Glass Gallons	999,752	$.6981	$697,927	$.6060	$605,850	$92,077
2%	Glass Gallons	265,390	.6500	172,504	.5580	148,088	24,416
Homo V.D. Milk	Paper Gallons	773,327	.7371	570,019	.6460	499,569	70,450
Homo V.D. Milk	Paper ½ "	5,321,403	.3685	1,960,937	.3230	1,718,813	242,124
Homo V.D. Milk	Paper Qts.	2,194,591	.2000	438,918	.1755	385,151	53,767
Chocolate Milk	Paper Qts.	163,037	.2437	39,732	.2178	35,509	4,223
Buttermilk	Paper ½ Gals.	331,344	.3685	122,100	.3050	101,060	21,040
Buttermilk	Paper Qts.	542,083	.2000	108,417	.1600	86,733	21,684
2%	Paper ½ Gals.	612,231	.3453	211,403	.2990	183,057	28,346
Fortified Skim Milk	Paper ½ Gals.	515,996	.3453	178,173	.2825	145,769	32,404
Fortified Skim Milk	Paper Qts.	415,587	.1917	85,419	.1500	66,838	18,581
Whipping Cream	Paper ½ Pts.	256,481	.3068	78,688	.2600	66,685	12,003
Half-Half	Paper Pints	1,577,403	.2984	470,697	.2440	384,886	85,811
Total				$5,134,934		$4,428,008	$706,926

715a

9/14/65

THE BORDEN COMPANY
CENTRAL DIVISION
ESTIMATED ANNUAL QUOTATION DIFFERENTIAL - ZONE #2 (SOUTH BEND AREA)

Item		Size	Annual Usage 3 -Day Delivery	Annual Usage 6 -Day Delivery	Borden Label Unit Price Week 5/8/65	Annual Value for Borden Label	A&P Label Unit Quotation 3 -day Delivery	A&P Label Unit Quotation 6 -day Delivery	Annual Value for A&P Label	Annual Differential
Homo V. D. Milk	Paper	Gal.	126,516	2,756	$.6305	$ 81,506	$.5910	$.6460	$ 76,551	$ 4,955
Homo V. D. Milk	"	½ Gal.	472,905	20,159	.3203	157,928	.2955	.3230	146,254	11,674
Homo V. D. Milk	"	Qts.	93,236	4,195	.1694	16,505	.1625	.1755	15,887	618
Chocolate Milk	"	Qts.	10,175	225	.2166	2,253	.2048	.2178	2,133	120
Buttermilk	"	½ Gal.	22,967	537	.3193	7,505	.2775	.3050	6,537	968
Buttermilk	"	Qts.	28,479	797	.1687	4,939	.1470	.1600	4,314	625
2%	"	½ Gal.	97,691	4,090	.2965	30,178	.2715	.2990	27,746	2,432
Fortified Skim Milk	"	½ Gal.	20,956	260	.2852	6,051	.2550	.2825	5,417	634
Fortified Skim Milk	"	Qts.	10,955	416	.1601	1,820	.1370	.1500	1,563	257
Whipping Cream	"	½ Pts.	13,277	832	.2555	3,605	.2470	.2600	3,495	110
Half & Half	"	Pts.	72,159	3,917	.2465	18,753	.2310	.2440	17,625	1,128
TOTAL						$331,043			$307,522	$23,521

5-6-65

216a

9/14/65

THE BORDEN COMPANY
CENTRAL DIVISION
ESTIMATED ANNUAL QUOTATION DIFFERENTIAL - ZONE #3 (ROCKFORD-JOLIET AREA)

Item		Size	Annual Usage in Units	Borden Label Unit Price Week 5/8/65	Annual Value for Borden Label	A&P Label Units Quotation	Annual Value for A&P Label	Annual Differential
Homo V. D. Milk	Paper	Gal.	50,353	$.7305	$ 36,783	$.6460	$ 32,528	$ 4,255
Homo V. D. Milk	"	½ Gal.	251,507	.3645	91,674	.3230	81,237	10,437
Homo V. D. Milk	"	Qts.	63,076	.1907	12,029	.1755	11,070	959
Chocolate Milk	"	Qts.	13,919	.2403	3,345	.2178	3,032	313
Buttermilk	"	½ Gal.	20,124	.3643	7,331	.3050	6,138	1,193
Buttermilk	"	Qts.	30,957	.1893	5,860	.1600	4,953	907
2%	"	½ Gal.	97,725	.3347	32,709	.2990	29,220	3,489
Fortified Skim Milk	"	½ Gal.	25,116	.3306	8,303	.2825	7,095	1,208
Fortified Skim Milk	"	Qts.	15,600	.1789	2,791	.1500	2,340	451
Whipping Cream	"	½ Pts.	29,588	.2882	8,527	.2600	7,693	834
Half & Half	"	Pts.	58,725	.2807	16,484	.2440	14,329	2,155
TOTAL					$225,836		$199,635	$26,201

501

717a

9/14/65

THE BORDEN COMPANY
CENTRAL DIVISION
ESTIMATED ANNUAL QUOTATION DIFFERENTIAL - ZONE #4 (MISCELLANEOUS AREA)

Item	Size	Annual Usage 3-Day Delivery	Annual Usage 5&6-Day Delivery	Borden Label Unit Price Week 5/8/65	Annual Value for Borden Label	A&P Label Unit Quotation 3-Day Delivery	A&P Label Unit Quotation 5&6-Day Delivery	Annual Value for A&P Label	Annual Differential
Homo W. D. Milk	Paper Gal.	60,702	97,777	$.6866	$108,812	$.5910	$.6460	$ 98,039	$ 9,773
Homo W. D. Milk	" ½ Gal.	232,163	480,932	.3501	253,156	.2955	.3230	227,175	25,981
Homo W. D. Milk	" Qts.	66,439	75,469	.1837	26,069	.1625	.1795	24,041	2,028
Chocolate Milk	" Qts.	111,319	112,168	.2325	5,160	.2048	.2178	4,668	492
Buttermilk	" ½ Gal.	6,257	24,007	.3580	10,835	.2775	.3050	9,058	1,777
Buttermilk	" Qts.	18,153	33,315	.1843	9,670	.1470	.1600	8,145	1,525
2%	" ½ Gal.	37,821	86,372	.3232	40,139	.2715	.2990	36,093	4,046
Fortified Skim Milk	" ½ Gal.	4,386	26,277	.3273	10,036	.2850	.2825	8,541	1,495
Fortified Skim Milk	" Qts.	9,446	17,663	.1707	4,628	.1370	.1500	3,943	685
Whipping Cream	" ½ Pts.	17,750	31,217	.2917	14,284	.2470	.2600	12,500	1,784
Half & Half	" Pts.	65,485	90,896	.2742	42,880	.2310	.2440	37,306	5,574
TOTAL					$525,968			$470,809	$55,160

718a

9/14/65

THE BORDEN COMPANY
CENTRAL DIVISION
ESTIMATED ANNUAL QUOTATION DIFFERENTIAL - ZONE #5 (ROCK ISLAND AREA)

Item		Size	Annual Usage in Units	Borden Label Unit Price Week 9/7/65	Annual Value for Borden Label	A&P Label Units Quotation	Annual Value for A&P Label	Annual Differential
Homo V. D. Milk	Paper	Gal.	148,911	$.6434	$ 95,809	$.6234	$ 92,831	$ 2,978
Homo V. D. Milk	"	½ Gal.	255,840	.3217	82,304	.3117	79,745	2,559
Homo V. D. Milk	"	Qts.	106,652	.1792	19,112	.1742	18,579	533
Chocolate Milk	"	Qts.	15,600	.2017	3,147	.1967	3,069	78
Buttermilk	"	½ Gal.	---	---	---	---	---	---
Buttermilk	"	Qts.	28,617	.1792	5,128	.1742	4,985	143
2%	"	½ Gal.	87,013	.2926	25,460	.2826	24,590	870
Fortified Skim Milk	"	½ Gal.	37,613	.2813	10,581	.2713	10,204	377
Fortified Skim Milk	"	Qts.	22,585	.1641	3,706	.1591	3,593	113
Whipping Cream	"	½ Pts.	23,157	.2798	6,479	.2748	6,364	115
Half & Half	"	Pts.	86,216	.2497	21,528	.2447	21,097	431
TOTAL					$273,254		$265,057	$ 8,197

September 14, 1965

The Borden Company

Central Division

General Quotation - A & P Private Label

Applicable to A & P Area No. 1 - Chicago-Calumet

(Related to Present Announced Superpool Class I Price of $4.32 per Cwt.)

Item	Size	* Net Unit Price for A & P Private Label Products Based on 6 Day Deliveries
Homogenized V.D. Milk	Glass Gallons	.6060
2%	Glass Gallons	.5580
Homogenized V.D. Milk	Paper Gallons	.6460
Homogenized V.D. Milk	Paper 1/2 Gal.	.3230
Homogenized V.D. Milk	Paper Quarts	.1755
2%	Paper Gallons	.5980
2%	Paper 1/2 Gal.	.2990
Vitamin Fortified Skim	Paper 1/2 Gal.	.2825
Vitamin Fortified Skim	Paper Quart	.1500
Half & Half	Paper Pint	.2440
Chocolate Milk	Paper Quart	.2178
Buttermilk	Paper 1/2 Gal.	.3050
Buttermilk	Paper Quart	.1600
Whipping Cream	Paper 1/2 Pint	.2600

* (1) Above net unit prices for A & P private label products are related to delivery conditions and co-operative program as set forth on accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of $4.32 per cwt. indicated above, in accordance with the price change per unit schedule attached.

The Borden Company

Central Division

Price Change Per Unit

A & P Area No. 1 - Chicago-Calumet

(Related to the Announced Chicago Superpool Class I Price of $4.32 per Cwt.)

Increase or Decrease Per Cwt.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

Price Change Per Unit

(Related to the Announced Superpool Class I Price of $4.32 per Cwt.)

Increase or Decrease per Cwt.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

The Borden Company

Central Division

General Quotation - A & P Private Label

Applicable to A & P Areas No. 2-3-4 (Town Listing Attached)

(Related to Present Announced Super Pool Class I Price of $4.32 per Cwt.)

Item	Size	* Net Unit Price for A & P Private Label Products: Based on 3-Day Drop Deliveries	Based on 5-6 Day Drop Deliveries
Homogenized V.D. Milk	Paper Gallons	.5910	.6460
Homogenized V.D. Milk	Paper 1/2 Gallons	.2955	.3230
Homogenized V.D. Milk	Paper Quarts	.1625	.1755
2%	Paper Gallons	.5430	.5980
2%	Paper 1/2 Gallons	.2715	.2990
Vitamin Fortified Skim	Paper 1/2 Gallons	.2550	.2825
Vitamin Fortified Skim	Paper Quarts	.1370	.1500
Half & Half	Paper Pints	.2310	.2440
Chocolate Milk	Paper Quarts	.2048	.2178
Buttermilk	Paper 1/2 Gallons	.2775	.3050
Buttermilk	Paper Quarts	.1470	.1600
Whipping Cream	Paper 1/2 Pints	.2470	.2600

* (1) Above Net Unit Prices for A & P Private Label Products are related to delivery conditions and co-operative program as set forth in accompanying schedule.

(2) Above Net Unit Prices for A & P Private Label Products are subject monthly to any change in the Class I price as such relates to the Class I price of $4.32 per cwt. indicated above, in accordance with the Price Change Per Unit schedule attached.

The Borden Company

Central Division

Town Listing - A & P Areas No. 2-3-4

A & P Store Locations	Present Type of Delivery 3-Day	5-Day	6-Day
South Bend, Indiana (6 stores)	x		
Mishawaka, Indiana	x		
Elkhart, Indiana	x		
Goshen, Indiana	x		
La Porte, Indiana	x		
Valparaiso, Indiana	x		
Walkerton, Indiana	x		
Michigan City, Indiana	x		
Chesterton, Indiana			x
South Bend, Indiana (1 store)			x
Lockport, Illinois			x
Aurora, Illinois (2 stores)			x
Joliet, Illinois (6 stores)			x
Rockford, Illinois (5 stores)			x
Freeport, Illinois			x
Loves Park, Illinois			x
Manteno, Illinois	x		
Marseilles, Illinois	x		
Spring Valley, Illinois	x		
Momence, Illinois	x		
Ottawa, Illinois	x		
Sandwich, Illinois	x		
Knox, Indiana	x		
St. Anne, Illinois	x		
Streator, Illinois	x		
Plano, Illinois	x		
North Judson, Indiana	x		
Gilman, Illinois	x		
Pontiac, Illinois	x		
Lacon, Illinois	x		
Galena, Illinois	x		
La Salle, Illinois	x		
Princeton, Illinois	x		
Minonk, Illinois	x		
Warren, Illinois	x		
Belvidere, Illinois		x	
Rochelle, Illinois		x	
Dixon, Illinois		x	
Marengo, Illinois		x	
Polo, Illinois		x	
De Kalb, Illinois		x	

Town Listing - A & P Areas No. 2-3-4

A & P Store Locations	Present Type of Delivery		
	3-Day	5-Day	6-Day
Mt. Morris, Illinois		x	
Woodstock, Illinois			x
Fox Lake, Illinois			x
Kankakee, Illinois (2 stores)			x
Pecatonica, Illinois			x
Wilmington, Illinois			x
McHenry, Illinois			x
Antioch, Illinois			x
Wauconda, Illinois			x
Crystal Lake, Illinois			x
Zion, Illinois			x

The Borden Company

Central Division

Price Change Per Unit - A & P Areas No. 2-3-4

(Related to the Present Announced Chicago Super Pool Class I Price of $4.32 per Cwt.)

Increase or Decrease per Cwt.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

Price Change Per Unit - A & P Areas No. 2-3-4

(Related to the Present Announced Chicago Super Pool Class I Price of $4.32 per Cwt.)

Increase or Decrease per Cwt.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

56-P

THE BORDEN COMPANY
Central Division

September 14, 1965

General Quotation -- A & P Private Label
Applicable to A & P Area No. 5 - Rock Island Area - (Town Listing Attached)
(Related to the Announced Federal Order No. 63 Class I Price of $4.31 per Cwt. for September 1965)

Item		Size	* Net Unit Price for A & P Private Label Products Based on 3-Day Drop Delivery
Homogenized V.D. Milk	Paper	Gallon	.6234
Homogenized V.D. Milk	Paper	1/2 Gal.	.3117
Homogenized V.D. Milk	Paper	Quart	.1742
2%	Paper	1/2 Gal.	.2826
Vitamin Fortified Skim	Paper	1/2 Gal.	.2713
Vitamin Fortified Skim	Paper	Quart	.1591
Half & Half	Paper	Pint	.2447
Chocolate Milk	Paper	Quart	.1967
Buttermilk	Paper	Quart	.1742
Whipping Cream	Paper	1/2 Pint	.2748

* (1) Above Net Unit Prices for A & P Private Label Products are Related to Delivery Conditions and Co-operative Program as set forth in Accompanying Schedule.
(2) Above Net Unit Prices for A & P Private Label Products are subject Monthly to any Change in the Class I Price as such relates to the Class I Price of $4.31 per Cwt. indicated above, in Accordance with the Price Change per Unit Schedule attached.

56 Q

THE BORDEN COMPANY
Central Division

Town Listing - A & P Area No. 5 - Rock Island Area

A & P Store Location	Present Type of Delivery		
	3 Day	5 Day	6 Day
Geneseo, Illinois	x		
Kewanee, Illinois	x		
Lanark, Illinois	x		
Moline, Illinois (2 stores)	x		
Mt. Carroll, Illinois	x		
Rock Island, Illinois	x		
Savanna, Illinois	x		
Sterling, Illinois	x		
Toulon, Illinois	x		
Galesburg, Illinois (2 stores)	x		
Clinton, Iowa	x		
Davenport, Iowa (2 stores)	x		

THE BORDEN COMPANY
Central Division

Price Change Per Unit - A & P Area No. 5 - Rock Island Area

(Related to the Federal Order No. 63 Announced Class I Price of $4.31 per Cwt. for September 1965)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

THE BORDEN COMPANY
Central Division

Price Change Per Unit - A & P Area No. 5 - Rock Island Area

(Related to the Federal Order No. 63 Announced Class I Price of $4.31 per Cwt. for September 1965)

Increase or Decrease per CWT.	Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

56T

September 14, 1965

The Borden Company - Central Division

A & P Private Label Program

The new A & P Private Label milk program is based upon the following mutual understandings and the essentials of this new program are outlined below:

1. Borden personnel will assist in the formulation of this new program.

2. Borden personnel will also assist A & P personnel during the introductory period in the various phases of ordering and rotating of merchandise so that the program will achieve its ultimate sales goals and expectations. (Suggested Bulletins to Supervisors and Store Managers attached.)

3. A complete line of dairy products, as supplied by The Borden Company, should be featured in your dairy case.

4. Deliveries will be on a limited service basis as follows:

   (a) Stores served on a three-day per week basis will receive one delivery on Monday-Wednesday-Friday or Tuesday-Thursday-Saturday.

   (b) Stores served on a five-or six-day per week basis will receive one delivery per day.

   (c) The delivery time to each store will be handled in a manner to effectuate the most efficient delivery schedule.

   (d) Special deliveries shall not be made except in unusual instances, such as Borden's failure to perform on the advance order.

5. Deliveries at the store level shall be handled in the following manner:

   (a) To the receiving door of the store.
   (b) To a designated place on the receiving platform.
   (c) To a refrigerated storage box that can be entered directly from a platform or ground level location and into which dairy products can be conveniently stocked.
   (d) If dairy products are delivered to a refrigerated storage box, adequate storage space shall be provided so that proper rotation of carry-over merchandise can be handled by store personnel.
   (e) Empty milk cases and bottles shall be placed at a designated point for easy accessibility and pickup.

6. Ordering of Products.

(a) Advance order delivery tickets shall be supplied by The Borden Company.

(b) Advance order tickets for the following delivery shall be completed for presentation to the Borden driver at time of delivery.

7. Code Dates.

(a) Products are clearly coded on the gable of the milk items and on the bottom of all bucket products.

(b) All products are coded with an expiration date.

(c) Code date expirations shall be explained in the Chicago Unit Office and at local levels.

8. Credit for Product Returns.

(a) Credit for product returns shall be only on the basis of faulty containers or product remaining within code date.

9. Borden's will not be obligated to furnish any merchandising materials, price promotions, demonstrators, or special displays on A & P labelled products under this program.

10. Borden salesmen's services will be supplied at the store level only, to follow through on a complaint covering such matters as service, product, or container.

56 V

Suggestion for

BULLETIN NO. I

ATTENTION STORE NO._____

TO: SUPERVISORS AND STORE MANAGERS

Your store will be serviced with A & P labeled milk products by The Borden Company on a drop shipment delivery basis.

The essentials of this new purchasing arrangement are as follows:

1. Limited deliveries.
2. No returns.
3. No service in regard to rotation, stocking, etc.
4. Pre-order of merchandise.

We will advise you shortly of the requirements of ordering and handling of milk products under this new program and of our arrangements with Borden's.

The Borden Company will soon hold a series of meetings to explain to you the coordination of deliveries and to evaluate your physical set-up. The new pre-order system and control guide will help you obtain a pattern in regard to your requirements. These things must be covered in order that you may sensibly pre-order merchandise from the above supplier for your store's needs.

Please give these people your utmost cooperation. We recommend that you fully explain these procedures to your Assistant Manager, Dairy Department Head, or someone responsible for the operation and the ordering of dairy products. The new aspects of this system should be thoroughly understood and followed by members of your organization.

We will advise you shortly in regard to items and procedures and other details.

734a Suggestion for

BULLETIN NO. II

ATTENTION STORE NO._____

TO: SUPERVISORS AND STORE MANAGERS

The new A & P private label milk delivery program has now been worked out, and deliveries to your stores will start on Monday _____. With this new program, we will be getting maximum benefits from the fast moving dairy items and it will be to our advantage for you to work with your supplier to handle this properly in order that we may all be successful in this venture.

Deliveries will be made on a limited service basis as follows:

(a) Stores served on a three day per week basis will receive one delivery on Monday-Wednesday-Friday or Tuesday-Thursday-Saturday.

(b) Stores served on a five or six day per week basis will receive one delivery per day.

(c) Special deliveries shall not be made except the failure of Borden's to perform on the advance order.

Deliveries at the store level shall be handled in the following manner:

(a) To the receiving door of the store.

(b) To a designated place on the receiving platform.

(c) To a refrigerated storage box that can be entered directly from a platform or ground level location and into which dairy products can be conveniently stocked.

(d) If dairy products are delivered to a refrigerated storage box, adequate storage space shall be provided so that proper rotation of carry-over merchandise can be handled by store personnel.

(e) Empty milk cases and bottles shall be placed at a designated point for easy accessibility and pick-up.

Ordering of Products

(a) Pre-order forms will be furnished to you by The Borden Company.

(b) This order must be completed and be available in the cooler at the time of the delivery for the driver to pick up.

Example: On three day delivery -- Monday delivery, pick up order for Wednesday. Wednesday delivery, pick up order for Friday. Friday delivery, pick up order for Monday, etc.

On the five or six day delivery schedule, the order again must be completed and available in the cooler for the following day's delivery.

Please follow instructions in order that we may have no inconvenience or unnecessary expense by orders not being available as outlined above.

In all cases, order changes will not be accepted since they can be adjusted on the following day's order.

We recommend you try, whenever possible, to order merchandise in even cases. This may not be possible in smaller volume stores.

As always in the use of your order form, you must take into consideration your meat feature, the week-end pay days, 15th and 1st of the month, holidays, individual store promotions on dairy features, and consult your past order forms and inventories.

All products are under a "no return" basis and the only exception will be for manufacturing defects. Please use care.

Codes

(a) Products are clearly coded on the gable of the milk items and on the bottom of all bucket products.

(b) All products are coded with an expiration date.

(c) Code date expiration shall be explained to you at future meetings.

(d) Please check code dates daily and rotate. There will be no services offered in regard to rotation and checking by the supplier. Do not make the customer unhappy by having old products in the case due to lack of attention to this operation.

For those stores who are presently on a three day drop delivery method, this should be nothing new for you. It might be well, however, to again review all of the procedures in the ordering and handling of dairy products.

We sincerely believe that this new milk program is another stride forward for our company and you will be able to achieve your ultimate sales goals and expectations.

CAIDS P

9/7/60

Memo - a. P

Elmer Schmidt advises Tait that as result of the previous matters, Ralph + he should see Bob Hall, the accountant and know our gen'l interest went him and Hall would say that thing got to him (Elmer).

There was a rather disturbing change became this matter appeared was sold to Hall but other was the way Elmer wanted it to be handled.

Ralph called following the meeting. Hall appeared to be smart and attentive. Indicated a number of disturbing factors - Hall inquired of this was Borden's funds funds - funds but gen'l term to which we replied "definitely". Mankin advised Hall however that there were some things he would like to explore and reviewed for him pages the data presented dated 9/14/60. Hall asked a number of intelligent questions - understands we spend to products the $80,000 -

Hall further indicated that they would take the funds offer and compare - had some more figures coming in. Mankin indicated we would like to go ahead - Hall referred to the fact that Elmer has other figures - other things are involved.

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9/17/65

Memo - A&P

Elmer Schmidt advised Tarr that in view of his personal matters, Ralph and he should see Bob Hall, his assistant and leave our quotations with him and Hall would see that they got to him (Elmer).

This was a rather disturbing change because this matter it appeared was cold to Hall but this was the way Elmer wanted it to be handled.

Ralph called following the meeting. Hall appeared to be smart and attentive. Indicated a number of disturbing factors - Hall inquired if this was Borden's final, final - final best quotation to which we replied "definitely". Minkler advised Hall however that there were some things he would like to explain and reviewed page by page the data presented dated 9/14/65. Hall asked a number of intelligent questions. Understands we spread to products the $820,000.

Hall further indicated that they would take the final offer and compare - had some more figures coming in. Minkler indicated he would like to go ahead. Hall referred to the fact that Elmer has other figures - other things are involved.

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September 21, 1965.

THE BORDEN COMPANY

Central Division

Price Quotation Data covering

A & P Private Label Fluid Milk Products

in

A & P Zones No. 1, 2, 3, 4 & 5.

THE BORDEN COMPANY
Central Division

Summary of Decreased A & P Private Label Cost

Area No. 1	$694,524
Area No. 2	25,584
Area No. 3	39,270
Area No. 4	98,151
Area No. 5	25,308
Total	$882,837

740a

PRICES AS OF MAY 8, 1965

THE BORDEN COMPANY
CENTRAL DIVISION
ZONE NO. I - CHICAGO AND CALUMET AREA

COMMODITY	YEARLY USAGE	BORDEN LABEL UNIT COST	BORDEN LABEL ANNUAL COST	A & P LABEL UNIT COST	A & P LABEL ANNUAL COST	DIFFERENTIAL ANNUAL BASIS
Gals. Homo Paper	773,327	$.7371	$ 570,024	$.6220	$ 481,009	$ 89,015
½ Gals. Homo	5,321,403	.3685	1,960,937	.3110	1,654,956	305,981
Qts. Homo	2,194,591	.2000	438,915	.1705	374,178	64,737
Qts. Chocolate	163,037	.2437	39,728	.2150	35,053	4,675
½ Gals. Buttermilk	331,344	.3685	122,096	.3030	100,397	21,699
Qts. Buttermilk	542,083	.2000	108,420	.1560	84,565	23,855
½ Gals. 2%	612,231	.3453	211,397	.2900	177,547	33,850
½ Gals. Skim	515,996	.3453	178,169	.2820	145,511	32,658
Qts. Skim	445,587	.1917	85,419	.1440	64,165	21,254
½ Pts. Whip Cream	256,481	.3068	78,693	.2640	67,711	10,982
Pts. Half-Half	1,577,403	.2984	470,704	.2440	384,886	85,818
TOTAL			$4,264,502		$3,569,978	$694,524

21,834,438 Pts.

741a

THE BORDEN COMPANY
CENTRAL DIVISION
ZONE NO. II - SOUTH BEND AREA

PRICES AS OF MAY 8, 1955

COMMODITY	YEARLY USAGE	BORDEN LABEL UNIT COST (ave.)	BORDEN LABEL ANNUAL COST	A & P LABEL UNIT COST	A & P LABEL ANNUAL COST	DIFFERENTIAL ANNUAL BASIS
Gals. Homo	129,272	$.6305	$ 81,501	3-Day $.5848	$ 75,709	$ 5,792
				6-Day .6248		
½ Gals. Homo	493,064	.3203	157,907	3-Day .2924	144,575	13,332
				6-Day .3124		
Qts. Homo	97,431	.1694	16,501	3-Day .1612	15,748	753
				6-Day .1712		
Qts. Chocolate	10,400	.2166	2,253	3-Day .2057	2,142	111
				6-Day .2157		
½ Gals. Buttermilk	23,504	.3193	7,505	3-Day .2844	6,695	810
				6-Day .3044		
Qts. Buttermilk	29,276	.1687	4,940	3-Day .1467	4,303	637
				6-Day .1567		
½ Gals. 2%	101,781	.2965	30,177	3-Day .2714	27,705	2,472
				6-Day .2914		
½ Gals. Skim	21,216	.2852	6,050	3-Day .2634	5,593	457
				6-Day .2834		
Qts. Skim	11,371	.1601	1,820	3-Day .1347	1,536	284
				6-Day .1447		
½ Pts. Whip Cream	14,109	.2555	3,605	3-Day .2547	3,602	3
				6-Day .2647		
Pts. Half-Half	76,076	.2465	18,755	3-Day .2337	17,822	933
				6-Day .2447		
TOTAL			$331,014		$305,430	$ 25,584

2,034,881 Pts

742a.

THE BORDEN COMPANY

Central Division

Zone No.III - Rockford-Joliet Area.

Prices as of May 8

Commodity	Yearly Usage	Borden Label Unit Coast Average	Borden Label Annual Cost	A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	50,353	$.7305	$36,781	$.5972	$30,071	$ 6,710
1/2 Gals. Homo	251,507	.3645	91,676	.2986	75,100	16,576
Quarts Homo	63,076	.1907	12,029	.1643	10,363	1,666
Quarts Chocolate	13,919	.2403	3,345	.2088	2,906	439
1/2 Gals.Butter-milk	20,124	.3643	7,332	.2906	5,848	1,484
Quarts Buttermilk	30,957	.1893	5,859	.1498	4,637	1,222
1/2 Gals. 2%	97,725	.3347	32,708	.2776	27,128	5,580
1/2 Gals. Skim	25,116	.3306	8,303	.2696	6,771	1,532
Quarts Skim	15,600	.1789	2,791	.1378	2,150	641
1/2 Pts.Whipping Cream	29,588	.2882	8,528	.2578	7,628	900
Pints Half-Half	58,725	.2807	16,484	.2378	13,964	2,520
Total			$225,836		$186,566	$39,270

1,170,171 Pts

743a

THE BORDEN COMPANY
Central Division

Prices as of May 8

ZONE NO. IV -- Miscellaneous Area

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost	A & P Label Unit Cost (Average)	A & P Label Annual Cost	Differential Annual Basis
Gallons Homo	158,479	$ .6866	$ 108,819	$ .5627	$ 89,173	$ 19,646
1/2 Gals. Homo	723,095	.3501	253,188	.2825	204,331	48,857
Quarts Homo	141,908	.1837	26,069	.1548	21,970	4,099
Quarts Chocolate	23,487	.2325	5,460	.1992	4,678	782
1/2 Gals. Buttermilk	30,264	.3580	10,833	.2769	8,379	2,454
Quarts Buttermilk	52,468	.1843	9,672	.1414	7,417	2,255
1/2 Gals. 2%	124,193	.3232	40,144	.2619	32,528	7,616
1/2 Gals. Skim	30,663	.3273	10,036	.2571	7,883	2,153
Quarts Skim	27,109	.1707	4,628	.1295	3,511	1,117
1/2 Pints Whip Cream	48,967	.2917	14,283	.2494	12,212	2,071
Pints Half & Half	156,381	.2742	42,883	.2288	35,782	7,101
			$ 526,015		$ 427,864	$ 98,151

2,900,000 Qts

744a

Prices as of May 8

THE BORDEN COMPANY
Central Division

Zone No. V---Rock Island Area.

Commodity	Yearly Usage	Borden Label Unit Cost Average	Borden Label Annual Cost	A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	148,911	$.6066	$90,324	$.5468	$81,425	$ 8,899
1/2 Gals. Homo	255,840	.3035	77,636	.2734	69,947	7,689
Quarts Homo	106,652	.1710	18,235	.1517	16,179	2,056
Quarts Chocolate	15,600	.1933	3,016	.1874	2,923	93
Quarts Buttermilk	28,617	.1714	4,905	.1372	3,926	979
1/2 Gals. 2%	87,013	.2743	23,868	.2524	21,962	1,906
1/2 Gals. Skim	37,613	.2627	9,880	.2444	9,193	687
Quarts Skim	22,585	.1573	3,553	.1252	2,828	725
1/2 Pts. Whipping Cream	23,157	.2717	6,292	.2452	5,679	613
Pints Half-Half	86,216	.2445	21,077	.2252	19,416	1,661
Total			$258,786		$233,478	$25,308

1,039,403 Qts

September 21, 1965

THE BORDEN COMPANY

CHICAGO - CALUMET AREA (ZONE NO. I)

GENERAL QUOTATION - A & P PRIVATE LABEL

(Related to the Present Announced Superpool Class I Price of $4.29)

	Net for Borden Label	* Net for A & P Private Label
Homo V. D. Milk - Gal. Paper	$ .7371	$ .6220
Homo V. D. Milk - 1/2 Gal. Paper	.3685	.3110
Homo V. D. Milk - Qts. Paper	.2000	.1705
2% - Gal. Paper	.6906	.5800
2% - 1/2 Gal. Paper	.3453	.2900
Vitamin Fortified Skim - 1/2 Gal. Paper	.3453	.2820
Vitamin Fortified Skim - Qts. Paper	.1917	.1400
Half & Half - Pts. Paper	.2984	.2440
Chocolate Milk - Qts. Paper	.2437	.2150
Buttermilk - 1/2 Gal. Paper	.3685	.3030
Buttermilk - Qts. Paper	.2000	.1560
Whipping Cream - 1/2 Pts. Paper	.3068	.2640

* (1) Above net unit prices for A & P private label products are related to delivery conditions and cooperative program as set forth on the accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of $4.29 per cwt. indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit pricesfor A & P private label products are subject to change in connection with changes that occur in the cost of labor and containers.

THE BORDEN COMPANY

General Quotation -- A & P Private Label

(Related to Present Announced Superpool Class I Price of $4.32 Per Cwt.)

Private Label Products	Net Price for A & P Private Label Products by Type and Method of Delivery			
	3-Day Per Week Drop Delivery	4-Day Per Week Drop Delivery	5-Day Per Week Drop Delivery	6-Day Per Week Drop Delivery
Homo V.D. Milk - Gallon Paper	.5848	.6048	.6148	.6248
Homo V.D. Milk - 1/2 Gal. Paper	.2924	.3024	.3074	.3124
Homo V.D. Milk - Quart Paper	.1612	.1662	.1687	.1712
2% - 1/2 Gal. Paper	.2714	.2814	.2864	.2914
Vitamin Fortified Skim - 1/2 Gal. Paper	.2634	.2734	.2784	.2834
Vitamin Fortified Skim - Quart Paper	.1347	.1397	.1422	.1447
Half & Half - Pint Paper	.2337	.2397	.2422	.2447
Chocolate Milk - Quart Paper	.2057	.2107	.2132	.2157
Buttermilk - 1/2 Gal. Paper	.2844	.2944	.2994	.3044
Buttermilk - Quart Paper	.1467	.1517	.1542	.1567
Whipping Cream - 1/2 Pint Paper	.2547	.2597	.2622	.2647

Prices apply to stores located in the geographical area subject to the terms of the Chicago Superpool which are as follows:

Stores Receiving 3-Day Per Week Delivery:

South Bend (6 stores), Mishawaka
Elkhart, Goshen, La Porte, Valparaiso,
Walkerton and Michigan City.

Stores Receiving 6-Day Per Week Delivery:

Chesterton, South Bend (1 store).

Stores Receiving 4-Day and 5-Day Per Week Delivery:

None

(1) Above net unit prices for A & P private label products are related to delivery conditions and co-operative program as set forth on the accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of $4.32 per cwt., indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit prices for A & P private label products are subject to change in connection with changes that occur in the cost of labor and containers.

Schedule No. 2 - Part 2
(Zone No. 3)
September 21, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to Present Announced Superpool Class I Price of $4.00 per Cwt.)

* Net Price for A & P Private Label Products by Type and Method of Delivery

Private Label Products	3 - Day Per Week Drop Delivery	4 - Day Per Week Drop Delivery	5 - Day Per Week Drop Delivery	6 - Day Per Week Drop Delivery
Homo V.D. Milk - Gal. Paper	.5572	.5772	.5872	.5972
Homo V.D. Milk - 1/2 Gal. Paper	.2786	.2886	.2936	.2986
Homo V.D. Milk - Quart Paper	.1543	.1593	.1618	.1643
2% - 1/2 Gal. Paper	.2576	.2676	.2726	.2776
Vitamin Fortified Skim - 1/2 Gal. Paper	.2496	.2596	.2646	.2696
Vitamin Fortified Skim - Quart Paper	.1278	.1328	.1353	.1378
Half & Half - Pint Paper	.2278	.2328	.2353	.2378
Chocolate Milk - Quart Paper	.1988	.2038	.2063	.2088
Buttermilk - 1/2 Gal. Paper	.2706	.2806	.2856	.2906
Buttermilk - Quart Paper	.1398	.1448	.1473	.1498
Whipping Cream - 1/2 Pint Paper	.2478	.2528	.2553	.2578

Prices apply to stores located in the geographical area subject to the terms of the Rockford Superpool which are as follows:

Stores Receiving 6-Day Per Week Delivery:

Lockport, Aurora (2 stores), Joliet (6 stores), Rockford (5 stores), Freeport and Loves Park.

Stores Receiving 3-Day - 4-Day - or 5-Day Per Week Delivery:

None

* (1) Above net unit prices for A & P private label products are related to delivery conditions and co-operative program as set forth on the accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of $4.00 per cwt. indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit prices for A & P private label products are subject to change in connection with changes that occur in the cost of labor and containers.

Schedule No. 3 - Part 2
(Zone No. 4)
September 21, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to the Announced Class I Price Under Federal Order No. 30 of $3.78 per Cwt.)

* Net Price for A & P Private Label Products by Type and Method of Delivery

Private Label Products	3-Day Per Week Drop Delivery	4-Day Per Week Drop Delivery	5-Day Per Week Drop Delivery	6-Day Per Week Drop Delivery
Homo V.D. Milk - Gal. Paper	.5380	.5580	.5680	.5780
Homo V.D. Milk - 1/2 Gal. Paper	.2690	.2790	.2840	.2890
Homo V.D. Milk - Quart Paper	.1495	.1545	.1570	.1595
2% - 1/2 Gal. Paper	.2480	.2580	.2630	.2680
Vitamin Fortified Skim Milk - 1/2 Gal. Paper	.2400	.2500	.2550	.2600
Vitamin Fortified Skim Milk - Quart Paper	.1230	.1280	.1305	.1330
Half & Half - Pint Paper	.2230	.2280	.2305	.2330
Chocolate Milk - Quart Paper	.1940	.1990	.2015	.2040
Buttermilk - 1/2 Gal. Paper	.2610	.2710	.2760	.2810
Buttermilk - Quart Paper	.1350	.1400	.1425	.1450
Whipping Cream - 1/2 Pint Paper	.2430	.2480	.2505	.2530

Prices apply to stores located in the geographical area subject to the announced Class I milk prices under Federal Order No. 30, (which Class I milk prices are not subject to producer "superpool" payments) which stores are as follows:

Stores Receiving 3-Day Per Week Delivery:

Manteno	Momence	St. Annes	Gilman	La Salle
Marseilles	Ottawa	Streator	Pontiac	Princeton
Spring Valley	Sandwich	Plano	Lacon	Minonk
Culver	Knox	North Judson	Galena	Warren
Mendota				

Stores Receiving 4-Day Per Week Delivery:

None

Stores Receiving 5-Day Per Week Delivery

Belvidere	Marengo	DeKalb
Rochelle	Polo	Mt. Morris
Dixon		

Stores Receiving 6-Day Per Week Delivery:

Woodstock	McHenry
Fox Lake	Antioch
Kankakee (2 stores)	Wauconda
Pecatonica	Crystal Lake
Wilmington	Zion

* (1) Above net unit prices for A & P private label products are related to delivery conditions and co-operative program as set forth on the accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of $3.78 per cwt. indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit prices for A & P private label products are subject to change in connection with changes that occur in the cost of labor and containers.

Schedule 4 - Part 2
(Zone No. 5)
September 21, 1965

THE BORDEN COMPANY

GENERAL QUOTATION - A & P PRIVATE LABEL

(Related to the Announced Class I Price Under Federal Order #63) of * 3.88 per Cwt.

* Net Price for A & P Private Label Products by Type and Method of Delivery

Private Label Products	3-Day Per Week Drop Delivery	4-Day Per Week Drop Delivery	5-Day Per Week Drop Delivery	6-Day Per Week Drop Delivery
Homo V.D. Milk Gal. Paper	.5468	.5668	.5768	.5868
Homo V.D. Milk 1/2 Gal. Paper	.2734	.2804	.2884	.2934
Homo V.D. Milk Quart Paper	.1517	.1567	.1592	.1617
2% - 1/2 Gal. Paper	.2524	.2624	.2674	.2724
Vit. Fort. Skim Milk 1/2 Gal. Paper	.2444	.2544	.2594	.2644
Vit. Fort. Skim Milk Quart Paper	.1252	.1302	.1327	.1352
Half & Half Pint Paper	.2252	.2302	.2327	.2352
Chocolate Milk Quart Paper	.1874	.1924	.1949	.1974
Buttermilk Quart Paper	.1372	.1422	.1447	.1472
Whipping Cream 1/2 Pint Paper	.2452	.2502	.2527	.2552

Prices apply to stores in the geographical area subject to the announced Class I Milk prices under Federal Order No. 63, (which Class I Milk prices are not subject to producer "Super Pool" payments) which stores are as follows:

Stores Receiving 3 Day Per Week Delivery

Genesco Kewanee Lanark Moline (2 Stores)
Mt. Carroll Rock Island Savannah Sterling
Toulon Galesburg (2 Stores) Clinton Davenport (2 Stores)

Stores Receiving 4 Day, 5 Day or 6 Day Delivery

None.

* (1) Above net unit prices for A & P private label products are related to delivery conditions and co-operative program as set forth on the accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of $3.88 per cwt. indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit prices for private label products are subject to change in connection with changes that occur in the cost of labor and containers.

September 21, 1965

THE BORDEN COMPANY
Central Division

Price Change Per Unit Schedule

Increase or Decrease per CWT. in Class I Price	Resulting Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

September 21, 1965

THE BORDEN COMPANY
Central Division

Price Change Per Unit Schedule

Increase or Decrease per CWT. in Class I Price	Resulting Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

September 21, 1965

The Borden Company - Central Division

A & P Private Label Program

The new A & P Private Label milk program is based upon the following mutual understandings and the essentials of this new program are outlined below:

1. Borden personnel will assist in the formulation of this new program.

2. Borden personnel will also assist A & P personnel during the introductory period in the various phases of ordering and rotating of merchandise so that the program will achieve its ultimate sales goals and expectations. (Suggested Bulletins to Supervisors and Store Managers attached.)

3. A complete line of dairy products, as supplied by The Borden Company, should be featured in your dairy case.

4. Deliveries will be on a limited service basis as follows:

   (a) Stores served on a three-day per week basis will receive one delivery on Monday-Wednesday-Friday or Tuesday-Thursday-Saturday.

   (b) Stores served on a five-or six-day per week basis will receive one delivery per day.

   (c) The delivery time to each store will be handled in a manner to effectuate the most efficient delivery schedule.

   (d) Special deliveries shall not be made except in unusual instances, such as Borden's failure to perform on the advance order.

5. Deliveries at the store level shall be handled in the following manner:

   (a) To the receiving door of the store.
   (b) To a designated place on the receiving platform.
   (c) To a refrigerated storage box that can be entered directly from a platform or ground level location and into which dairy products can be conveniently stocked.
   (d) If dairy products are delivered to a refrigerated storage box, adequate storage space shall be provided so that proper rotation of carry-over merchandise can be handled by store personnel.
   (e) Empty milk cases and bottles shall be placed at a designated point for easy accessibility and pickup.

6. Ordering of Products.

   (a) Advance order delivery tickets shall be supplied by The Borden Company.

   (b) Advance order tickets for the following delivery shall be completed for presentation to the Borden driver at time of delivery.

7. Code Dates.

   (a) Products are clearly coded on the gable of the milk items and on the bottom of all bucket products.

   (b) All products are coded with an expiration date.

   (c) Code date expirations shall be explained in the Chicago Unit Office and at local levels.

8. Credit for Product Returns.

   (a) Credit for product returns shall be only on the basis of faulty containers or product remaining within code date.

9. Borden's will not be obligated to furnish any merchandising materials, price promotions, demonstrators, or special displays on A & P labelled products under this program.

10. Borden salesmen's services will be supplied at the store level only, to follow through on a complaint covering such matters as service, product, or container.

Suggestion for

BULLETIN NO. I

ATTENTION STORE NO._____

TO: SUPERVISORS AND STORE MANAGERS

Your store will be serviced with A & P labeled milk products by The Borden Company on a drop shipment delivery basis.

The essentials of this new purchasing arrangement are as follows:

1. Limited deliveries.
2. No returns.
3. No service in regard to rotation, stocking, etc.
4. Pre-order of merchandise.

We will advise you shortly of the requirements of ordering and handling of milk products under this new program and of our arrangements with Borden's.

The Borden Company will soon hold a series of meetings to explain to you the coordination of deliveries and to evaluate your physical set-up. The new pre-order system and control guide will help you obtain a pattern in regard to your requirements. These things must be covered in order that you may sensibly pre-order merchandise from the above supplier for your store's needs.

Please give these people your utmost cooperation. We recommend that you fully explain these procedures to your Assistant Manager, Dairy Department Head, or someone responsible for the operation and the ordering of dairy products. The new aspects of this system should be thoroughly understood and followed by members of your organization.

We will advise you shortly in regard to items and procedures and other details.

756a

Suggestion for

BULLETIN NO. II

ATTENTION STORE NO._____

TO: SUPERVISORS AND STORE MANAGERS

The new A & P private label milk delivery program has now been worked out, and deliveries to your stores will start on Monday _____. With this new program, we will be getting maximum benefits from the fast moving dairy items and it will be to our advantage for you to work with your supplier to handle this properly in order that we may all be successful in this venture.

Deliveries will be made on a limited service basis as follows:

(a) Stores served on a three day per week basis will receive one delivery on Monday-Wednesday-Friday or Tuesday-Thursday-Saturday.

(b) Stores served on a five or six day per week basis will receive one delivery per day.

(c) Special deliveries shall not be made except the failure of Borden's to perform on the advance order.

Deliveries at the store level shall be handled in the following manner:

(a) To the receiving door of the store.

(b) To a designated place on the receiving platform.

(c) To a refrigerated storage box that can be entered directly from a platform or ground level location and into which dairy products can be conveniently stocked.

(d) If dairy products are delivered to a refrigerated storage box, adequate storage space shall be provided so that proper rotation of carry-over merchandise can be handled by store personnel.

(e) Empty milk cases and bottles shall be placed at a designated point for easy accessibility and pick-up.

Ordering of Products

(a) Pre-order forms will be furnished to you by The Borden Company.

(b) This order must be completed and be available in the cooler at the time of the delivery for the driver to pick up.

Example: On three day delivery -- Monday delivery, pick up order for Wednesday. Wednesday delivery, pick up order for Friday. Friday delivery, pick up order for Monday, etc.

On the five or six day delivery schedule, the order again must be completed and available in the cooler for the following day's delivery.

Please follow instructions in order that we may have no inconvenience or unnecessary expense by orders not being available as outlined above.

In all cases, order changes will not be accepted since they can be adjusted on the following day's order.

We recommend you try, whenever possible, to order merchandise in even cases. This may not be possible in smaller volume stores.

As always in the use of your order form, you must take into consideration your meat feature, the week-end pay days, 15th and 1st of the month, holidays, individual store promotions on dairy features, and consult your past order forms and inventories.

All returns are under a "no return" basis and the only exception will be for [illegible] defects. Please use care.

Codes

(a) Products are clearly coded on the gable of the milk items and on the bottom of all bucket products.

(b) All products are coded with an expiration date.

(c) Code date expiration shall be explained to you at future meetings.

(d) Please check code dates daily and rotate. There will be no services offered in regard to rotation and checking by the supplier. Do not make the customer unhappy by having old products in the case due to lack of attention to this operation.

For those stores who are presently on a three day drop delivery method, this should be nothing new for you. It might be well, however, to again review all of the procedures in the ordering and handling of dairy products.

We sincerely believe that this new milk program is another stride forward for our company and you will be able to achieve your ultimate sales goals and expectations.

Schedule No. 2 - Part 1
(Zone No. 3)

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$4.0000
Market Administrator's Fee	.0200
Shrinkage	.0043
Procurement, Bulk Tank Premium, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.2743
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$4.2043

MILK COSTS BY ITEMS

Quarts	2.15 pounds X $4.2043 per cwt.	= $.0904
Half Gallons	4.30 pounds X 4.2043 per cwt.	= .1808
Gallons	8.60 pounds X 4.2043 per cwt.	= .3616

Schedule No. 3 - Part 1.
(Zone No. 4)

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$3.7800
Market Administrator's Fee	.0200
Shrinkage	.0041
Procurement, Bulk Tank Premiums, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.0541
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$3.9841

MILK COSTS BY ITEMS

Quarts 2.15 pounds x $3.9841 per cwt.	=	$ .0857
Half Gallons 4.30 pounds x 3.9841 per cwt.	=	.1713
Gallons 8.60 pounds x 3.9841 per cwt.	=	.3426

Schedule No. 4 - Part 1
(Zone No. 5)

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$ 3.8800
Market Administrator's Fee	.0200
Milk Foundation and City Health Inspection Fee	.0200
Waste	.0040
Premiums	.1000
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$ 4.0240
To 3.4% B.F. Finished Product	.0720
Cost of 3.4% Finished Product	$ 3.9520

MILK COSTS BY ITEMS

Quarts 2.15 pounds X $3.9520	=	$ .0850
Half Gallons 4.30 pounds x 3.9520	=	.1699
Gallons 8.60 pounds X3.9520	=	.3398

Schedule #1

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price - 3.5% B.F.	$ 4.2900
Market Administrator's Fee	.0200
Shrinkage 1%	.0045
Procurement, Bulk Tank Premiums Association Fees, Inner Zone Premiums, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$ 4.5645
To 3.4% B.F. Finished Product	.0740
Cost of 3.4% Finished Product	$ 4.4905

MILK COST BY ITEMS

Quart	2.15 pounds x $4.4905 per cwt.	=	$ .0966
Half Gallon	4.30 pounds x $4.4905 per cwt.	=	.1931
Gallon	8.60 pounds x $4.4905 per cwt.	=	.3862

Schedule No. 1 - Part 1
(Zone No. 2)

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$4.3200
Market Administrator's Fee	.0200
Shrinkage	.0045
Procurement, Bulk Tank Premiums, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.5945
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$4.5245

MILK COST BY ITEMS

Quarts 2.15 pounds X $4.5245 per cwt.	= $.0973
Half Gallons 4.30 pounds X 4.5245 per cwt.	= .1946
Gallons 8.60 pounds X 4.5245 per cwt.	= .3891

Schedule No. 2 - Part 1
(Zone No. 3)

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$4.0000
Market Administrator's Fee	.0200
Shrinkage	.0043
Procurement, Bulk Tank Premium, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.2743
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$4.2043

MILK COSTS BY ITEMS

Quarts 2.15 pounds X $4.2043 per cwt.	= $.0904
Half Gallons 4.30 pounds X 4.2043 per cwt.	= .1808
Gallons 8.60 pounds X 4.2043 per cwt.	= .3616

Schedule No. 3 - Part 1.
(Zone No. 4)

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$3.7800
Market Administrator's Fee	.0200
Shrinkage	.0041
Procurement, Bulk Tank Premiums, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.0541
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$3.9841

MILK COSTS BY ITEMS

Quarts 2.15 pounds x $3.9841 per cwt.	=	$ .0857
Half Gallons 4.30 pounds x 3.9841 per cwt.	=	.1713
Gallons 8.60 pounds x 3.9841 per cwt.	=	.3426

Schedule No. 4 - Part 1
(Zone No. 5)

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$ 3.8800
Market Administrator's Fee	.0200
Milk Foundation and City Health Inspectio.. Fee	.0200
Waste	.0040
Premiums	.1000
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$ 4.0240
To 3.4% B.F. Finished Product	.0720
Cost of 3.4% Finished Product	$ 3.9520

MILK COSTS BY ITEMS

Qua.. s 2.15 pounds X $3.9520	= $	.0850
Half Gallons 4.30 pounds x 3.9520	=	.1699
Gallons 8.60 pounds X3.9520	=	.3398

Supreme Court, U. S.
FILED
OCT 31 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume III
Pages 766a to 941a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1977
CERTIORARI GRANTED MARCH 20, 1978

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Draft

9/xx/40-

Yesterday's meeting with Elmer Schmidt
was helpful considered this matter.

Pursuant yesterday we wrote before that we
sent computation.

At a point of the sub details were worked out point
of letter - consolidation idea - how to be done and we
have to cover same.

Talked about letter - A & P how it reads that when
you come out with a letter - the biggest tangible
thing that has happened on the Chicago market.
Explanation over very well follows - A & P on
Swift sheet we are - understand and very upset.
letter indicate - continue of some sizes available
have to also say - we promise to you we depended
and below cost - not designed to increase, difficult
to foresee any - matter of cost - Expense of
operating computations - Do not foresee
operating of computation - You were in error
as to state same - Sirs - understand what
you are saying, tremendously important, glad
Swift brought it up - Should have as a star
other basis.

Pursuant " Burden & A & P had a relationship for
- 2 - to many years - great regret for our evaluation
thing for us - Do say same - A & P executive P &
wants a look for a quotation - Global would
point by letter a quotation - A & P were
disappointed although they were going to get
a record better prices on P & - Considered
they would have to be satisfied for other
quotation - Pool - were decidedly shocked -

63B
9/24/65

(13)

Quotations were tremendously different. Told ... that if our quote was reasonable we were ent. Examined. decided we would have to look at it from "every time" accounting Received - seems you have substantially met the other quotes. E.S. I. think that we 100% right - We will get into this week Bill time - Iron and legal counsel How learned the possible legal involvements and are glad you brought this up. Our person very hard quotations around and bad.

Some more items over - this brings you thru Schedule reflects prices between various markets but to difference in future prices.

Covered glove & allow. bothers to stay about this buying the evaluation. Get into details what we were paying - Stay away from P.K. one glove and let me price it - very very tight.

63C

Staff

9/22/65

Yesterday's meeting with Elmer Schmidt we believe concluded this matter.

Convinced yesterday as never before that we met competition.

At a point after all details were covered - point of letter - sensitive area - has to be done and we have to cover same -

Talked about letter - A&P has to realize that when you come out with a letter - the biggest single thing that has happened in the Chicago market. Litigation can very well follow. A&P is in same boat we are. Understand and recognizes. Letter indicate - customers of same size - availability. have to also say - our prices to you are defensable - not below cost - not designed to injure. Difficult to prove up matter of cost. Defense of meeting competition. In our opinion meeting of competition - you will be called on to state the same. Said - understand what you are saying, tremendously important, glad you brought it up - should nang on to the other bids.

RRM says "Borden and A&P had a relationship for a great many years - great respect for our customers - they for us. Day came - A&P wanted P. L. milk -asked for a quotation. Studied and put together a quotation - A&P was surprised - thought they were going to get a much better price on P. L.

63D

Concluded they would have to go outside for other quotations - Did - were terribly shocked - Quotations were tremendously different. Told us that if our quote was unchanged we were out. Examined - decided we would have to look at it from "anyhow" accounting. Revised - now you have substantially met the other quotes. "E.S." I think this is 100% right - We will get into this with Bill Lewis - Ira and legal counsel. Have discussed the possible legal involvement and am glad you brought this up. Our opinion they had quotations around our bid.

Said more than once - this brings you there. Schedules reflect prices between various markets tied to difference in farmer prices.

Covered glass gallons - talked to them about their buying the containers - Got into details what we were prefer - Stay away from P. L. in glass and let us price it-very receptive.

77Ca

THE BORDEN COMPANY
CENTRAL DIVISION
1821 S. KILBOURN AVENUE
CHICAGO, ILLINOIS 60623

Copy of attachments letter to A+P 9/27/65 (Receipt) 7 A+P Chicago

RALPH R. MINKLER
PRESIDENT

September 23, 1965.

Mr. Jack B. Pentz, President
Borden's Milk and Ice Cream Co.,
Division of The Borden Company
350 Madison Avenue
New York, New York 10017.

Dear Jack:

As of the time I am dictating this letter (which is right after noon) we have not had any further word from A & P. Everything stands right where it did when I talked to you by telephone this morning.

Enclosed are two sets of the material presented to Elmer Schmidt yesterday afternoon.

I again want to remind you that the figure of $882,837 when updated to September pay prices to the farmers, becomes approximately $820,000. Just so you have the detail on this it is as follows:

For Chicago-Calumet, the farmer price has moved from $4.29 to $4.32. This 3¢ increase in the cost of Milk will reduce A & P's savings in this area by $15,284.

In the South Bend area (Zone #2) the price is unchanged - it remains at $4.32.

In Zone #3 - Rockford-Joliet, the farmer price has moved from $4.00 to $4.21, which will reduce A & P's savings by $5,409.

Zone #4 is a Miscellaneous area in Illinois, and the price has moved from $3.78 to $4.21. This will affect A & P by $26,976.

In Zone #5, which is Rock Island, the price has moved from $3.88 to $4.31, with an affect of $15,246.

CX 64A

Mr. Jack B. Pentz September 23, 1965.

Added up, these total $62,916 - which when subtracted from the $882,837, approximates $820,000.

I am sincerely hoping that we get some final word from A & P today. After that, what unfolds from all of this, only time will disclose. I am sure it will be tremendous.

Cordially,

Ralph R. Minkler.

RRM*mlb
enc 2 sets of prices:

64B

772a

COST DIFFERENTIALS (A&P VS. BORDEN LABEL) BY ITEMS:

COMMODITY	YEARLY USAGE UNITS	BORDEN LABEL COST	A&P LABEL COST	DIFFERENTIAL
All Paper				
Gals. Homo	1,260,342	$ 887,449	$ 835,623	$ 51,826
½ Gals. Homo	7,044,909	2,541,638	2,377,978	163,366
Qts. Homo	2,543,658	511,749	476,390	35,359
Qts. Chocolate	226,443	53,802	52,329	1,473
½ Gals. Buttermilk	405,236	147,766	135,423	12,343
Qts. Buttermilk	683,401	133,796	117,176	16,620
½ Gals. 2%	1,022,943	338,294	318,153	20,141
½ Gals. Skim	630,604	212,438	197,964	15,512
Qts. Skim	522,252	98,211	83,303	14,818
½ Pts. Whip Cream	372,302	111,401	100,138	11,263
Pts. Half & Half	1,798,400	569,903	502,615	67,288
		$5,606,447	$5,197,182	$410,009

773a

170

SUMMARY PRESENT COST VS BORDEN & BOWMAN QUOTATIONS

COMMODITY	YEARLY USAGE UNITS	BORDEN LABEL COST	BOWMAN'S A&P LABEL QUOTATION	BORDEN'S A&P LABEL QUOTATION	COST SAVINGS BORDEN VS A&P QUOTATION FROM BORDEN
ALL PAPER					
Gals. Homo	1,260,342	$ 887,449	$ 789,235	$ 757,387	$ 130,062
½ Gals. Homo	7,044,909	2,541,638	2,204,357	2,148,909	392,729
Qts. Homo	2,543,658	511,749	441,936	438,438	73,311
Qts. Chocolate	226,443	53,802	47,068	47,702	6,100
½ Gals. Buttermilk	405,236	147,766	126,735	125,245	22,521
Qts. Buttermilk	683,401	133,796	101,417	100,922	32,874
½ Gals. 2%	1,022,943	338,294	300,160	286,870	51,424
½ Gals. Skim	630,604	212,438	188,645	174,951	37,487
Qts. Skim	522,252	98,211	85,224	74,190	24,021
½ Pts. Whip Cream	372,302	111,401	95,937	96,832	14,569
Pts. Half & Half	1,798,400	569,903	488,397	471,870	98,033
		$5,606,447	$4,869,111	$4,723,316	$ 883,131

00069

CX65B

CX ... A

9/28

Mr. Bartels

Attached is the latest detail on A&P label milk. It includes

131

Summary of Borden vs Borman's A&P & Borden A&P

Borden's quotations and program

Quote on all as of buy & Borden prices

Borman's quotations

A&P gallon glass from A&P is not quoted in the attached because for them to do so would mean

Carrying additional glass inventory & using bottle common to both their label and ours yet distinguishable from competition for separation at Chicago bottle exchange

Color band on neck might suffice.

Further do we want to encourage sale of gallons when they have been troublesome at the store level

The Chicago visit presently leans toward retention of Borden label - however we have not had one final meeting on this subject

00108

Borden quotation is applicable to all Iowa stores. Which stores would be dropped has not been marked.

X66

5862 182

66B
129

Jn Swiss Switzerland the Lot is
addition to Baden + A&P temporarily
until efforts can be gained.

Quotations are based on purchases since
as of May 5th. The difference
between Baden + A&P on label
prices would be approx $60,000 less
or $80,000.- since Baden has
absorbed the increase on their own
label since that date.

Jr, I shall call you tomorrow (Wed A M)
and discuss further with you

L.

Badens letter concerning "proportionately
equal" prices will be sent tomorrow

Harry will be in New York - doubtful
I will have quotations however

(87

776a

Form 242 - 4-64
Ptd. In U.S.A.

INTER-COMPANY CORRESPONDENCE

To: Mr. E. R. Schmidt

From: F. B. Carver

Date 10/14/65

Subject: A&P (Private) Label Milk

Confirming our conversation, Mr. Herschel Smith, of Headquarters called and advised that Chicago Unit has approval to handle private label milk.

A confiming letter from Mr. Smith will be mailed tomorrow, the 15th.

F. B. Carver

Copies:
Mr. E. J. Vogel
Mr. M. E. Pierce
Mr. R. G. Gamble

10/15 T. Barden - D. Farr
Mail legal ~~Ltr~~ 11/1

CX 70A 1

9552 NX

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182

174

Mr. E. B. Schmidt | F. B. Carver | 10/11/65

A&P (Private) Label Milk

Confirming our conversation, Mr. Marshal Smith, of Headquarters called and advised that Chicago Unit has approval to handle private label milk.

A confirming letter from Mr. Smith will be mailed tomorrow, the 15th.

F. B. Carver

Copies:
Mr. E. J. Vogel
Mr. H. F. Pierce
Mr. R. C. Cowle

Introducing A&P
Nov 1, 1965

CX 70 B.

CXID-7/A

187

10/14/60

D. P

Jaw reported late on the afternoon that he had a telephone call from Elmer Schmeltz who indicated that we were the private label supplier and that he wanted to meet with Jaw the first thing on Friday morning.

The points were impressed to Jaw of the importance of progressing to organize the program based from D.P standpoint and summary of personnel, procurement of canteens etc were only a few of the matters involved. It was our hope that possibly the closing date would not be earlier than Dec. 1, 1960.

Jaw indicated that D.T had scheduled an organization meeting on this area on Oct 26, 1960 and thought that the matter would be discussed then.

A&P

10/14/65

Tarr reported late in the afternoon that he had a telephone call from Elmer Schmidt who indicated that we were the private label supplier and that he wanted to visit with Tarr the first thing on Friday morning.

The point was expressed to Tarr of the importance of proper time to organize the program both from A&P standpoint and ours. Training of personnel, procurement of cartons, etc. were only a few of the matters involved. It was our hope that possibly the starting date would not be earlier than Dec. 1, 1965.

Tarr indicated that A&P had scheduled an organization meeting in this area on Oct. 26, 1965 and thought that the matter would be discussed then.

September 21, 1965

The Borden Company - Central Division

A & P Private Label Program

The new A & P Private Label milk program is based upon the following mutual understandings and the essentials of this new program are outlined below:

1. Borden personnel will assist in the formulation of this new program.

2. Borden personnel will also assist A & P personnel during the introductory period in the various phases of ordering and rotating of merchandise so that the program will achieve its ultimate sales goals and expectations. (Suggested Bulletins to Supervisors and Store Managers attached.)

3. A complete line of dairy products, as supplied by The Borden Company, should be featured in your dairy case.

4. Deliveries will be on a limited service basis as follows:

   (a) Stores served on a three-day per week basis will receive one delivery on Monday-Wednesday-Friday or Tuesday-Thursday-Saturday.

   (b) Stores served on a five-or six-day per week basis will receive one delivery per day.

   (c) The delivery time to each store will be handled in a manner to effectuate the most efficient delivery schedule.

   (d) Special deliveries shall not be made except in unusual instances, such as Borden's failure to perform on the advance order.

5. Deliveries at the store level shall be handled in the following manner:

   (a) To the receiving door of the store.
   (b) To a designated place on the receiving platform.
   (c) To a refrigerated storage box that can be entered directly from a platform or ground level location and into which dairy products can be conveniently stocked.
   (d) If dairy products are delivered to a refrigerated storage box, adequate storage space shall be provided so that proper rotation of carry-over merchandise can be handled by store personnel.
   (e) Empty milk cases and bottles shall be placed at a designated point for easy accessibility and pickup.

750

- 2 -

6. Ordering of Products.

(a) Advance order delivery tickets shall be supplied by The Borden Company.

Now to all but 56 day del points.

previously (b) Advance order tickets for the following delivery shall be completed for presentation to the Borden driver at time of delivery.

7. Code Dates.

(a) Products are clearly coded on the gable of the milk items and on the bottom of all bucket products.

(b) All products are coded with an expiration date.

(c) Code date expirations shall be explained in the Chicago Unit Office and at local levels.

8. Credit for Product Returns.

(a) Credit for product returns shall be only on the basis of faulty containers or product remaining within code date.

9. Borden's will not be obligated to furnish any merchandising material price promotions, demonstrators, or special displays on A & P labelled products under this program.

Required by Comm.

10. Borden salesmen's services will be supplied at the store level only, to follow through on a complaint covering such matters as service, product, or container.

✓ ✓ ✓ ✓ ✓

* D. Jacoby or other markets (Orderly Jobs etc) for meeting contacts at store level - if any.

73C

Suggestion for

BULLETIN NO. I

ATTENTION STORE NO._____

TO: SUPERVISORS AND STORE MANAGERS

Your store will be serviced with A & P labeled milk products by The Borden Company on a drop shipment delivery basis.

The essentials of this new purchasing arrangement are as follows:

1. Limited deliveries.
2. No returns.
3. No service in regard to rotation, stocking, etc.
4. Pre-order of merchandise.

We will advise you shortly of the requirements of ordering and handling of milk products under this new program and of our arrangements with Borden's.

The Borden Company will soon hold a series of meetings to explain to you the coordination of deliveries and to evaluate your physical set-up. The new pre-order system and control guide will help you obtain a pattern in regard to your requirements. These things must be covered in order that you may sensibly pre-order merchandise from the above supplier for your store's needs.

Please give these people your utmost cooperation. We recommend that you fully explain these procedures to your Assistant Manager, Dairy Department Head, or someone responsible for the operation and the ordering of dairy products. The new aspects of this system should be thoroughly understood and followed by members of your organization.

We will advise you shortly in regard to items and procedures and other details.

Suggestion for

75

BULLETIN NO. II

[illegible]

ALL SUPERVISORS AND STORE MANAGERS

The new A & P private label milk delivery program has now been worked out, and deliveries to your stores will start on Monday _____. With this new program, we will be getting maximum benefits from the fast moving dairy items and it will be to our advantage for you to work with your supplier to handle this properly in order that we may all be successful in this venture.

Deliveries will be made on a limited service basis as follows:

(a) Stores served on a three day per week basis will receive one delivery on Monday-Wednesday-Friday or Tuesday-Thursday-Saturday.

(b) Stores served on a five or six day per week basis will receive one delivery per day.

(c) Special deliveries shall not be made except the failure of Borden's to perform on the advance order.

Deliveries at the store level shall be handled in the following manner:

(a) To the receiving door of the store.

(b) To a designated place on the receiving platform.

(c) To a refrigerated storage box that can be entered directly from a platform or ground level location and into which dairy products can be conveniently stocked.

(d) If dairy products are delivered to a refrigerated storage box, adequate storage space shall be provided so that proper rotation of carry-over merchandise can be handled by store personnel.

(e) Empty milk cases and bottles shall be placed at a designated point for easy accessibility and pick-up.

Ordering of Products

(a) Pre-order forms will be furnished to you by The Borden Company.

(b) This order must be completed and be available in the cooler at the time of the delivery for the driver to pick up.

10

75 E

Example: On three day delivery -- Monday delivery, pick up order on Wednesday. Wednesday delivery, pick up order for Friday. Friday delivery, pick up order for Monday, etc.

On the five or six day delivery schedule, the order again must be completed and available in the cooler for the following day's delivery.

Please follow instructions in order that we may have no inconvenience or unnecessary expense by orders not being available as outlined above.

In all cases, order changes will not be accepted since they can be adjusted on the following day's order.

We recommend you try, whenever possible, to order merchandise in even cases. This may not be possible in smaller volume stores.

As always in the use of your order form, you must take into consideration your meat feature, the week-end pay days, 15th and 1st of the month, holidays, individual store promotions on dairy features, and consult your past order forms and inventories.

All products are under a "no return" basis and the only exception will be for manufacturing defects. Please use care.

Codes

(a) Products are clearly coded on the gable of the milk items and on the bottom of all bucket products.

(b) All products are coded with an expiration date.

(c) Code date expiration shall be explained to you at future meetings.

(d) Please check code dates daily and rotate. There will be no services offered in regard to rotation and checking by the supplier. Do not make the customer unhappy by having old products in the case due to lack of attention to this operation.

For those stores who are presently on a three day drop delivery method, this should be nothing new for you. It might be well, however, to again review all of the procedures in the ordering and handling of dairy products.

We sincerely believe that this new milk program is another stride forward for our company and you will be able to achieve your ultimate sales goals and expectations.

//

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October 20, 1965

THE BORDEN COMPANY

CHICAGO - CALUMET AREA (ZONE NO. 1)

A & P PRIVATE LABEL

(Related to the Present Announced Superpool Class I Price of $4.32)

	Net for A & P Private Label
Homo V. D. Milk - Gal. Paper	.6248
Homo V. D. Milk - 1/2 Gal. Paper	.3124
Homo V. D. Milk - Qts. Paper	.1712
2% - 1/2 Gal. Paper	.2914
Vitamin Fortified Skim - 1/2 Gal. Paper	.2834
Vitamin Fortified Skim - Qts. Paper	.1407
Half & Half - Pts. Paper	.2447
Chocolat Milk - Qts. Paper	.2157
Buttermilk - 1/2 Gal. Paper	.3044
Buttermilk - Qts. Paper	.1567
Whipping Cream - 1/2 Pts. Paper	.2647

October 20, 1965 75 G

THE BORDEN COMPANY

SOUTH BEND AREA (ZONE NO. 2)

A & P PRIVATE LABEL

(Related to the Present Announced Superpool Class I Price of $4.32)

Net Price for A & P Private Label Products by Type and Method of Delivery

	3-Day Per Week Drop Delivery	6-Day Per Week Drop Delivery
Homo V. D. Milk - Gallon Paper	.5848	.6248
Homo V. D. Milk - 1/2 Gal. Paper	.2924	.3124
Homo V. D. Milk - Quart Paper	.1612	.1712
2% - 1/2 Gal. Paper	.2714	.2914
Vitamin Fortified Skim - 1/2 Gal. Paper	.2634	.2834
Vitamin Fortified Skim - Quart Paper	.1347	.1447
Half & Half - Pint Paper	.2337	.2447
Chocolate Milk - Quart Paper	.2057	.2157
Buttermilk - 1/2 Gal. Paper	.2844	.3044
Buttermilk - Quart Paper	.1467	.1567
Whipping Cream - 1/2 Pint Paper	.2547	.2647

Prices apply to stores located in the geographical area subject to the terms of the Chicago Superpool which are as follows:

Stores Receiving 3-Day Per Week Delivery:

South Bend (6 stores), Mishawaka Elkhart, Goshen, LaPorte, Valparaiso, Walkerton and Michigan City.

Stores Receiving 6-Day Per Week Delivery:

Chesterton, South Bend (1 store).

754

October 20, 1965

THE BORDEN COMPANY

ROCKFORD AREA (ZONE NO. 3)

A & P PRIVATE LABEL

(Related to the Present Announced Superpool Class I Price of $4.25)

Net Price for A & P Private Label Products
by Type and Method of Delivery

	6-Day Per Week Drop Delivery
Homo V. D. Milk - Gal. Paper	.6188
Homo V. D. Milk - 1/2 Gal. Paper	.3094
Homo V. D. Milk - Quart Paper	.1697
2% - 1/2 Gal. Paper	.2884
Vitamin Fortified Skim - 1/2 Gal. Paper	.2804
Vitamin Fortified Skim - Quart Paper	.1432
Half & Half - Pint Paper	.2432
Chocolate Milk - Quart Paper	.2142
Buttermilk - 1/2 Gal. Paper	.3014
Buttermilk - Quart Paper	.1552
Whipping Cream - 1/2 Pint Paper	.2632

Prices apply to stores located in the geographical area subject to the terms of the Rockford Superpool which are as follows:

Stores Receiving 6-Day Per Week Delivery:

Lockport, Aurora (2 stores), Joliet (6 stores), Rockford (5 stores), Freeport and Loves Park.

75 I

October 20, 1965

THE [illegible] COMPANY

[illegible] METROPOLITAN AREA (ZONE NO. 4)

A & P PRIVATE LABEL

(Related to the Present Announced Superpool Class I Price of $4.25)

	Net Price for A & P Private Label Products by Type and Method of Delivery		
	3-Day Per Week Drop Delivery	5-Day Per Week Drop Delivery	6-Day Per Week Drop Delivery
Homo V. D. Milk - Gal. Paper	.5708	.5908	.6108
Homo V. D. Milk - 1/2 Gal. Paper	.2894	.3044	.3094
Homo V. D. Milk - Quart Paper	.1597	.1672	.1697
2% - 1/2 Gal. Paper	.2884	.2934	.2984
Vitamin Fortified Skim Milk-1/2 Gal. Paper	.2504	.2754	.2804
Vitamin Fortified Skim Milk - Qt. Paper	.1332	.1407	.1432
Half & Half - Pint Paper	.2332	.2407	.2432
Chocolate Milk - Quart Paper	.2042	.2117	.2142
Buttermilk - 1/2 Gal. Paper	.2814	.2914	.3014
Buttermilk - Quart Paper	.1452	.1527	.1552
Whipping Cream - 1/2 Pint Paper	.2532	.2607	.2632

Prices apply to stores located in the geographical area subject to the announced Class I milk prices under Federal Order No. 30, (which Class I milk prices are not subject to producer "superpool" payments) which stores are as follows:

Stores Receiving 3-Day Per Week Delivery:

Manteno	Momence	St. Annes	Gilman	LaSalle
Marseilles	Ottawa	Chrystal	Pontiac	Princeton
Spring Valley	Sandwich	Plano	Lacon	Minonk
Culver	Knox	North Judson	Galena	Warren
Mendota				

Stores Receiving 5-Day Per Week Delivery:

Belvidere	Marengo	DeKalb
Rochelle	Polo	Mt. Morris
Dixon		

Stores Receiving 6-Day Per Week Delivery:

Woodstock	Wilmington	Wauconda
Fox Lake	McHenry	Crystal Lake
Pecatonica	Antioch	Zion
Kankakee (2 stores)		

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October 20, 1965

THE BORDEN COMPANY

ROCK ISLAND AREA (ZONE NO. 5)

A & P PRIVATE LABEL

(Related to the Present Announced Superpool Class I Price of $4.35)

Net Price for A & P Private Label Products
by Type and Method of Delivery

	3-Day Per Week Drop Delivery
Homo V.D. Milk Gal. Paper	.3676
Homo V.D. Milk 1/2 Gal. Paper	.2030
Homo V. D. Milk Quart Paper	.1319
2% - 1/2 Gal. Paper	.2728
Vit. Fort. Skim Milk 1/2 Gal. Pape	.2340
Vit. Fort. Skim Milk Quart Paper	.1354
Half & Half Pint Paper	.2554
Chocolate Milk Quart Paper	.1976
Buttermilk Quart Paper	.1674
Whipping Cream 1/2 Pint Paper	.2554

Prices apply to stores in the geographical area subject to the announced Class I Milk prices under Federal Order No. 65, (which Class I Milk prices are not subject to producer "Super Pool" payments) which stores are as follows:

Stores Receiving 3-Day Per Week Delivery:

Geneseo	Savannah
Kewanee	Sterling
Lanark	Toulon
Moline (2 stores)	Galesburg (2 stores)
Mt. Carroll	~~Clinton~~
Rock Island	~~Davenport (2 stores)~~

202

790a 12/15 8 LP Chicago

THE BORDEN COMPANY
CENTRAL DIVISION
1821 S. KILDOURN AVENUE
CHICAGO, ILLINOIS 60623

RALPH R. MINKLER
PRESIDENT

December 7, 1965.

-No copy to me-

Mr. Jack B. Pentz, President
Borden's Milk and Ice Cream Co.,
Division of The Borden Company
350 Madison Avenue
New York, New York 10017.

Dear Jack:

A few days ago we had a 'phone conversation, during which I made some comment about the trend of A & P sales volume. It has been extremely disturbing to us, particularly here in Chicago and in Milwaukee. Currently, the Chicago volume is running about 11% behind weekly and their year to date position is down 8%.

In Milwaukee the weekly decline on my last report was 17½% and the year to date stands at 20½%. These figures reflect a trend which has been going on for many months and it deeply disturbs us, of course.

You asked me to give you some elaboration on this.

To be real succinct about all that needs to be said is that this customer just has not been aggressive. Naturally, I cannot tell you why this is, but I can tell you that it seems to be a sensitive subject with A & P people and one that we can only comment upon to them with extreme care.

As near as we can find out, milk sales and overall store sales are suffering to about the same extent. This is partly an assumption as far as we are concerned, because we get conflicting statements, depending upon the person to whom we are talking. One fellow will say: "Look, you haven't anything to worry about, our overall sales are down (but don't quote me) more than milk is off." Another one will say: (and it may be because he thinks it is good propaganda) "the milk volume in our stores is off somewhat more than the overall."

CX 75-P

CX ID 75-A

There is more than one reason for their present position, of course. For years, both here and in Milwaukee, the A & P was the dog with the bone! They were the biggest and they were vulnerable. The attached sheet from a Milwaukee Journal Consumer Analysis shows how their percentages of household's buying from them dropped from 15.6 in 1964 and will be down to 7.5 in 1966. I can remember when this 15.6 figure was up close to 40%. In Milwaukee, Kohl's have expanded substantially. So have the Sentry Stores and other major groups.

The following comments pertain particularly to the Chicago area:

1. In 1965, A & P had no major promotional activity to bring customers into their stores such as dishware promotions, mailers with coupons and giveaways and very few bonus stamp promotions - all of which were heavy volume producing activities throughout 1964.

2. A & P's competition such as Jewel, National Tea and others have followed one promotion after another all year with mailers for free merchandise and other valuable coupons, newspaper ads heavy with "cash off" coupons and, in the instance of National Tea and Kroger, newspaper coupons good for bonus stamps on many items each week.

3. During the year, new super markets with aggressive selling activities have opened near many former high volume A & P stores and have seriously affected A & P's volume at those locations.

4. Generally speaking, Jewel and others have more help in their stores and customers move through their check-out lanes more rapidly. In many A & P stores during their peak sales periods, checkers have had to do their own bagging, not all lanes are open, and long lines back up in the store.

5. A & P is not competitive pricewise with competition with certain items. An example is glass gallons of milk. Certified, Grocerland and others operating stores in close proximity of A & P stores are featuring and selling gallon jugs for 69¢ while A & P sells for 79¢. Other chains will

CX 759

meet all competition while A & P will only meet the competition if the competing store near them is a corporate chain such as Jewel or National.

Of course, when it comes to commenting on advertising, it is important to recognize that personal opinion is very much involved. Attached is a "Who Cares" ad that somehow hits me wrong. In conjunction with this series, they have had large window signs prominently displayed in all their stores - the copy reading "WHO CARES FOR YOU? WE CARE." This seems to me to say that they recognize some of their shortcomings (again in my opinion) and can be more negative than positive.

When you ask me to comment, Jack, you stated that you wanted to pass this information on to Harry Archer. I assume this was simply to add to his background knowledge of the A & P picture. As I indicated before, we have found that A & P personnel are pretty sensitive to almost anything which seems to imply any question in our minds about their approaches, even though we always preface anything of this nature by pointing out our mutual interest and our desire to be helpful, if possible.

I'd sum up all of this once more by saying that the problem is basically one of not being aggressive on the selling side of their business. We have certainly learned they're aggressive as the devil on the buying side!

It is likely that their problem will get worse, unless some dominating changes are introduced. For example, if A & P becomes completely preoccupied with the Private Label approach and tries harder and harder to hide the advertised brands - their competition will start playing the game in just the opposite manner.

Maybe this is a way brand names will eventually begin to move back into the ascendency.

Cordially,

RRM*mlb
attachment.

Ralph R. Minkler.

CX 75 R

Compiled by The Milwaukee Journal—Nov. 1, 1965

Retail Food Groups

	Number of Stores Greater Milwaukee (4 County Area)	Total Stores in Wisconsin or Serviced From Milwaukee Whse.
Kohl's Food Stores	29	34

11100 W. Burleigh St., 771-5600

Max Kohl, Herbert Kohl, Sidney Kohl, Allen Kohl
Walter Newhauser, Buyer — Frank Kastner
Dick Lieberg, Buyer — Nick MacKendy, Adv.
Mrs. Inez Barnard, Asst. Buyer — Ray Patin, Frozen Foods
Wm. Innes, Meats — David Harkavy, Produce
Fred Jawer, Delicatessen

National Food Stores	33	62

2727 W. Silver Spring, 463-1881

Walter Kalm, Div. Mgr.
Buyers: Jim Bartz — Jerry Lohman, SM.
Neale Neelen
Gene Wage, Meats

Atlantic & Pacific Tea Co.	52	140

11500 W. Burleigh St., 453-8400

Daniel M. Reardon, V.P. — Ralph Franzen, SM. and AM.
Buyers: Don Dixon — Hugh G. MacMillan, Asst. SM.
Don Cathcart — Lorenz Kromke, Adv.
Don Weiler
Ralph Johnson
Elmer Gunter, Meats

Kroger Food Stores	23	61

4700 N. 102nd St., Butler, Wis., 781-0250
Jack W. Davis, Vice-President
Richard Koster, Merchandise Manager
William Whiting, Advertising Manager
Buyers: Jack Winer, Grocery — Merchandisers: A. R. Tousey, Grocery
Eugene Clark — Jim Ditty, Meat
John Foss — Harry Marks, Produce
Erv Holzman, Meat
Wayne Harris, Produce

Sentry Food Stores	29	57

Godfrey Co.
1200 W. Sunset Dr., Waukesha, Phone 542-0311
James E. Godfrey, Pres.
John Godfrey, Executive Vice-Pres.
Ken Wilkinson, Dir. of Pur., Grocery and Meats
Dick Browne, Dir. of Adv.
Bert Block, Dir. of Produce

Shop Rite Stores	15	33
Red Bell Stores	82	243

Roundy's, Inc.
11300 W. Burleigh St., 453-8200
Jim Aldrich, Pres.
Buyers: Sam Lewis — Elroy F. Ihlenfeld, V.P.
Roland Schumann — Cleto Bartelt, SM.
Gordon Nowers — Tom Reading, AM.
Don Kolvenbach — Garry Pisarek, Asst. AM.
Len Raddatz, Meats
John Spicuzza, Prod.

CX 75 S

X 203

Red Owl Stores 4016 N. Teutonia Ave., 871-0510 Neal Jenson, Dist. Mgr., Milwaukee Val Schultz, Divisional Mgr., Green Bay Buying, 215 E. Excelsior Blvd., Hopkins, Minn. William Quinn, V.P.	11	42
Cardinal Food Stores Consolidated Foods Corp., Chicago, Ill.	10	10
4-U Discount Foods	1	1
Halan's 2056 N. 70th St., 476-6735 Ramon C. George, Gen. Mgr.	3	3
AG Stores Associated Grocers, Inc. 1515 S. Sunny Slope Rd., 783-6210 Tom L. Billington, Exec. V.P. and Gen. Mgr. T. D. Billington, Asst. Mgr. and Buyer Clifton F. Jacobs, Buyer and Adv. Mgr.	142	165
Treasure Island Stores Hinky-Dinky, Inc., Omaha, Neb.	3	4
Neighborhood Stores (Independent).	400	3,500

*Milwaukee Journal Estimate—Stores not otherwise listed

Grocery Buying Habits

1965 MILWAUKEE JOURNAL CONSUMER ANALYSIS
Survey conducted Oct., 1965

Division of All Greater Milwaukee* Households According to Place Where They Last Bought Groceries

	Per Cent			Number		
	1965	1955	1950	1955	1965	19.4
All Stores Shopped	100.0%	100.0%	100.0%	414,000	407,000	401,000
Kohl's	24.4	20.0	17.5	101,200	81,000	70,000
National Food Stores	20.0	16.5	16.3	82,900	67,300	65,000
Sentry	11.4	12.6	11.4	47,300	51,400	45,800
Kroger	10.8	10.9	12.1	44,800	44,500	48,600
A. & P. Stores	7.5	13.0	15.6	31,100	53,000	62,600
Neighborhood Stores, Independent	7.1	8.0	7.6	29,400	32,000	30,500
Red Owl	3.9	4.6	4.6	16,200	18,800	18,500
Shop Rite	3.1	2.5	2.2	12,900	10,200	8,800
Cardinal	3.0	2.7	2.4	12,400	11,000	9,600
Treasure Island	1.8			7,500		
I. G. A.	1.7	3.0	2.9	7,000	12,200	11,600
Super-Valu	1.4	1.7	.....	5,800	6,900	.....
Red Bell	1.3	1.1	1.7	5,400	4,500	6,800
A G Shurfine Foods	.9	.9	1.1	3,700	3,700	4,400
Other	1.7	1.8	3.5	7,000	7,300	14,100
Total Sample	3,022	6,202	5,520			
Sample Base	3,022	6,202	5,520			

*MILWAUKEE, WAUKESHA, OZAUKEE and WASHINGTON counties.

NOTE: The above information should not be taken literally as the percent of business being done by each group. A July 1 revision in the Wisconsin lottery law legalizing certain kinds of store give-aways resulted in heavy promotions by several chains during the period from Oct. 1 to 15 when 90% of questionaires were returned by respondents.

CX 75 T

RELATION OF PRIVATE LABEL TO BORDEN
A & P STORES

Week Ending 12/25/65

12 Items Private Label	370,740 Points
Same 12 Items Borden's	262,337 Points
12 Items Percentage Private Label	58.86%
Percentage Private Label to Total Sales	46.31%
(Total Sales 800,583)	

Private Label Weekly Percentage Summary from November 1

	Percentage of P. L. to Total of 12 Private Label Items	Percentage of P. L. to Total Sales
Week Ending 11/6	55.22	43.94%
Week Ending 11/13	48.86	37.48%
Week Ending 11/20	50.42	38.54%
Week Ending 11/27	50.49	36.47%
Week Ending 12/4	49.35	35.41%
Week Ending 12/11	48.15	38.08%
Week Ending 12/18	51.83	40.52%
Week Ending 12/25	58.86%	46.31%

CX 754

THE BORDEN COMPANY - CHICAGO METROPOLITAN REGION
THE GREAT ATLANTIC AND PACIFIC TEA COMPANY
COMPARATIVE VALUE OF DAIRY PRODUCTS - ALL STORES - PURCHASED 1965-1964

Week Ending	Weekly Purchases 1965	Weekly Purchase 1964	Weekly Percentages	Accum. Total 1965	Accum. Total 1964	Year to Date %
Jan. 2	149316.53	-	-	-	-	-
Jan. 9	149793.06	-	-	-	-	-
Jan. 16	143750.74	-	-	-	-	-
Jan. 23	147246.87	-	-	-	-	-
Jan. 30	146061.12	-	-	-	-	-
Feb. 6	148220.37	-	-	-	-	-
Feb. 13	145518.25	-	-	-	-	-
Feb. 20	139379.59	-	-	-	-	-
Feb. 27	140417.16	-	-	-	-	-
Mar. 6	146087.11	-	-	-	-	-
Mar. 13	141078.98	-	-	-	-	-
Mar. 20	137668.52	-	-	-	-	-
Mar. 27	137025.13	-	-	-	-	-
Apr. 3	138162.85	-	-	-	-	-
Apr. 10	134194.61	-	-	-	-	-
Apr. 17	143239.97	-	-	-	-	-
Apr. 24	130397.78	-	-	-	-	-
May 1	134563.82	-	-	-	-	-
May 8	132789.92	-	-	-	-	-
May 15	128812.26	-	-	-	-	-
May 22	130323.73	-	-	-	-	-
May 29	136920.52	-	-	-	-	-
June 5	123662.37	-	-	-	-	-
June 12	131556.11	-	-	-	-	-
June 19	134824.44	-	-	-	-	-
June 26	133060.18	-	-	-	-	-
July 3	137705.27	-	-	-	-	-
July 10	120858.42	-	-	-	-	-
July 17	131961.15	-	-	-	-	-
July 24	129483.52	-	-	4,124,080.05	-	-
July 31	131630.59	-	-	4,255,710.64	-	-

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THE BORDEN COMPANY - CHICAGO METROPOLITAN REGION
THE GREAT ATLANTIC AND PACIFIC TEA COMPANY
ALL STORES - SALES UNITS COMPARISON 1965 - 1964

Week Ending	1965 No. Stores	Weekly Unit Sales 1965	1964 No. Stores	Weekly Unit Sales 1964	Weekly Percentage	Accum. Units 1965	Accum. Units 1964	Accum. Units Percentage
Jan. 2	257	859555	260	913634	(5.92)	859555	913634	(5.92)
Jan. 9	257	839055	260	865293	(3.03)	1698610	1778927	(4.52)
Jan. 16	257	804688	260	851854	(5.54)	2503298	2630781	(4.85)
Jan. 23	257	820260	260	825024	(.58)	3323558	3455805	(3.83)
Jan. 30	257	814710	258	859404	(5.20)	4138268	4315209	(4.10)
Feb. 6	257	826759	258	852038	(2.97)	4965027	5167247	(3.91)
Feb. 13	257	814314	257	839997	(3.06)	5779341	6007244	(3.79)
Feb. 20	257	780502	257	844388	(7.57)	6559843	6851632	(4.26)
Feb. 27	257	781942	257	828294	(5.60)	7341785	7679926	(4.40)
Mar. 6	257	817023	257	846729	(3.51)	8158808	8526715	(4.31)
Mar. 13	257	790182	257	841927	(6.15)	8948990	9368642	(4.48)
Mar. 20	258	772652	257	830069	(6.92)	9721642	10198711	(4.67)
Mar. 27	258	765685	257	898782	(14.81)	10487327	11097493	(5.50)
Apr. 3	258	775909	257	823121	(5.74)	11263236	11920614	(5.51)
Apr. 10	258	752133	257	821691	(8.47)	12015369	12742305	(5.71)
Apr. 17	258	792840	257	828073	(4.25)	12808209	13570378	(5.62)
Apr. 24	258	734755	257	814828	(9.83)	13542964	14385206	(5.86)
May 1	258	758095	258	832269	(8.91)	14301059	15217475	(6.02)
May 8	258	739685	258	806563	(8.29)	15040744	16024043	(6.14)
May 15	258	721592	258	803141	(10.15)	15762336	16827184	(6.33)
May 22	258	727374	258	795266	(8.65)	16489710	17623450	(6.49)
May 29	258	763337	258	691312	10.42	17253047	18314763	(5.80)
June 5	258	719255	258	870871	(17.41)	17972302	19185634	(6.32)
June 12	258	737442	258	826386	(10.76)	18709744	20012020	(6.51)
June 19	258	755282	258	805820	(6.27)	19465026	20817841	(6.50)
June 26	258	749362	258	811206	(7.62)	20214388	21629046	(6.54)
July 3	258	777477	258	741741	4.82	20991865	22370787	(6.16)
July 10	258	675216	258	869160	(22.31)	21667081	23239947	(6.77)
July 17	258	738477	258	818330	(9.76)	22405558	24058277	(6.87)
July 24	258	730696	257	814700	(10.31)	23136254	24872977	(6.98)
July 31	257	725674	257	791350	(8.30)	23861928	25664327	(7.02)

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THE BORDEN COMPANY
CENTRAL DIVISION
1821 S. KILDOURN AVENUE
CHICAGO, ILLINOIS 60623

RALPH R. MINKLER
PRESIDENT

January 3, 1965

Mr. Jack B. Pentz, President
Borden's Milk and Ice Cream Co.,
Div. of The Borden Company
350 Madison Avenue

1/7 Talked to Ken who will RM write

New York, N. Y. 10017

Dear Jack:

Here are two copies of the report on Chicago Unit A & P sales I referred to in my conversation with you early this morning.

This is the one which shows a decline from 1,028277 points in the weekending 12/25/64 one year ago, as contrasted to 800,583 points for the same week of 1965, the first full week when A & P was on a total private label basis.

-22.14 %
-8.61 %

Cordially,

Ralph R. Minkler.

RRM*mlb
attach 2 ccs

NV 7C 2(1)

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY
ALL STORES - SALES UNITS COMPARISON 1965 - 1964

Week Ending	1965 No. Stores	Weekly Unit Sales 1965	1964 No. Stores	Weekly Unit Sales 1964	Weekly Percentage	Accum. Units 1965	Accum. Units 1964	Accum. Units Percentage
Jan. 2	257	859555	260	913634	(5.92)	859555	913634	(5.92)
Jan. 9	257	839055	260	865293	(3.03)	1698610	1778927	(4.52)
Jan. 16	257	804688	260	851854	(5.54)	2503298	2630781	(4.85)
Jan. 23	257	820260	260	825024	(.58)	3323558	3455805	(3.83)
Jan. 30	257	814710	258	859404	(5.20)	4138268	4315209	(4.10)
Feb. 6	257	826759	258	852038	(2.97)	4965027	5167247	(3.91)
Feb. 13	257	814314	257	839997	(3.08)	5779341	6007244	(3.79)
Feb. 20	257	730502	257	844388	(7.57)	6509843	6851632	(4.26)
Feb. 27	257	781942	257	820294	(5.00)	7291785	7679923	(4.40)
Mar. 6	257	817023	257	840789	(5.51)	8108808	8520715	(4.31)
Mar. 13	257	790102	257	841927	(6.15)	8946990	9362642	(4.48)
Mar. 20	253	772652	257	838069	(6.92)	9721642	10198711	(4.67)
Mar. 27	258	765035	257	898702	(14.81)	10486677	11097413	(5.50)
Apr. 3	258	775909	257	838121	(7.42)	11262586	11935534	(5.61)
Apr. 10	258	752193	257	821691	(8.47)	12014779	12742305	(5.71)
Apr. 17	256	792040	257	828073	(4.35)	12806269	13570578	(5.62)
Apr. 24	258	734755	257	814020	(9.73)	13541024	14384208	(5.86)
May 1	258	758095	258	832269	(8.91)	14301059	15217475	(6.02)
May 8	258	739605	258	806568	(8.29)	15040744	16024043	(6.14)
May 15	258	721592	258	865141	(16.15)	15762336	16889184	(6.53)
May 22	258	727374	258	738286	(1.65)	16489710	17627450	(6.49)
May 29	258	763337	258	691312	10.42	17253047	18318763	(5.80)
June 5	258	719255	258	870371	(17.41)	17972302	19189134	(6.32)
June 12	258	747442	258	826386	(10.76)	18719744	20015520	(6.51)
June 19	258	755282	258	802020	(6.27)	19475026	20817540	(6.50)
June 26	258	749362	258	811203	(7.63)	20224388	21628743	(6.54)
July 3	258	777477	258	741741	4.82	20991865	22370767	(6.16)
July 10	258	675216	258	869100	(22.31)	21667081	23239947	(6.77)
July 17	258	738477	258	818330	(9.76)	22405558	24058277	(6.87)
July 24	258	730695	257	814700	(10.31)	23136254	24872977	(6.98)
July 31	257	725674	257	791350	(8.30)	23861928	25664327	(7.02)
Aug. 7	256	774176	258	857520	(9.73)	24636104	26521847	(7.11)
Aug. 14	256	756032	258	812843	(6.99)	25392136	27334690	(7.11)
Aug. 21	256	745909	258	793899	(6.04)	26138045	28128589	(7.08)
Aug. 28	256	748715	258	807770	(7.31)	26886760	28936359	(7.08)
Sept. 4	256	811515	258	884145	(8.22)	27698275	29820504	(7.12)
Sept. 11	256	677713	258	742222	(8.69)	28375988	30562726	(7.15)
Sept. 18	256	732201	258	824805	(11.23)	29108189	31387531	(7.20)
Sept. 25	256	731742	258	827948	(11.62)	29839931	32215479	(7.37)
Oct. 2	256	736247	258	831941	(11.50)	30576178	33047420	(7.48)
Oct. 9	256	729757	258	812286	(10.16)	31305935	33859706	(7.54)
Oct. 16	256	714998	258	822218	(13.04)	32020933	34681924	(7.67)
Oct. 23	256	715758	258	818226	(12.52)	32736691	35500150	(7.79)
Oct. 30	257	722105	258	819160	(11.83)	33458796	36319310	(7.88)
Nov. 6	256	745808	258	819595	(9.00)	34204604	37138905	(7.90
Nov. 13	256	699808	258	823733	(15.05)	34904412	37962638	(8.06)
Nov. 20	256	759475	258	854270	(11.10)	35663887	38816908	(8.12)
Nov. 27	256	784557	258	889293	(11.78)	36448444	39706201	(8.20)
Dec. 5	256	748803	253	804595	(6.93)	37197247	40510796	(8.18)
Dec. 11	256	740187	257	825784	(8.90)	37937434	41336580	(8.22)
Dec. 18	256	744994	257	838051	(11.10)	38682428	42174631	(8.28)
Dec. 25	255	800583	257	1028227	(22.14)	39483011	43202858	(8.61)
1-1-66		826321		889461	(7.08)			

RM — DP — Joe Malone — Store
Elmer Schmidt call ... 9:50 Central
Will not accept increase on
private label.

Met A+P Law Dept ... on
next Wed June 1.

O Guild Dell E. Schmidt that we would
hold up P.L. price increase
until a later date

I will tell H.B.S. that we are making
our case studies D. Rose here
when I return next June 20

I will ask H.B.S. for the
lawyers to talk to the Lawyers
Board Chi Legal Potter and
hopefully about K.C. Ed

804a

9/19/66

67 A

	Borden Farm Products	Wm. P. Foley Products	Total
Total Pounds Sold	407,705	437,141	844,846
Value of Sales:			
Cost of Sales			
Raw Products + Ingredients Cost	33,150.06	40,958.97	74,109.03
Containers Cost	4,555.06	4,555.09	9,110.15
Processing Cost	3,910.16	4,985.37	8,895.53
Transport Cost	2,288.95	2,487.66	4,776.61
Trailer Loading	952.42	1,041.66	1,994.08
Total Cost F.O.B. Point of Delivery	44,856.65	54,028.75	98,885.40
Delivery + Selling Cost			
Direct Route Wages + Immediate Supervisory Cost	6,464.65	6,805.39	13,270.04
Direct Route Commissions Cost	2,001.17	2,174.89	4,176.06
Indirect Route Wages + Immediate Supervisory Cost	1,790.76	1,945.47	3,736.23
Delivery Loading Cost	1,001.17	1,174.89	2,176.06
Clerical Cost	501.15	533.85	1,035.00
Utility Delivery Cost	1,454.58	1,551.95	3,006.53
Selling Expenses Cost	1,550.14	1,687.54	3,237.68
Advertising + Merchandising Cost			
Total Delivery + Selling Cost	13,670.11	15,544.14	31,214.25
Insurance + Administrative Cost	795.37	867.68	1,666.05
Total Cost of Sales	59,322.13	70,440.57	131,765.70
Profit or (Loss) before Taxes	3,961.60	(2,298.57)	1,663.03

	Borden Farm Products	Wm. P. Foley Products	Average for Total Sales
Value of Sales:	.1755	.1594	.1671
Cost of Sales			
Raw Products + Ingredients Cost	.0938	.0937	.0937
Containers Cost	.0112	.0112	.0112
Processing Cost	.0097	.0097	.0097
Transport Cost	.0057	.0057	.0057
Trailer Loading	.0024	.0024	.0024
Total Cost F.O.B. Point of Delivery	.1228	.1227	.1227
Delivery + Selling Cost			
Direct Route Wages + Immediate Supervisory Cost	.0156	.0156	.0156
Direct Route Commissions Cost	.0050	.0050	.0050
Indirect Route Wages + Immediate Supervisory Cost	.0045	.0045	.0045
Delivery Loading Cost	.0050	.0050	.0050
Clerical Cost	.0013	.0013	.0013
Utility Delivery Cost	.0036	.0036	.0036
Selling Expenses Cost	.0038	.0039	.0038
Advertising + Merchandising Cost			
Total Delivery + Selling Cost	.0370	.0356	.0373
Insurance + Administrative Cost	(.0020)	(.0020)	(.0020)
Total Cost of Sales	.1657	.1643	.1650
Profit or (Loss) before Taxes	.0098	(.0051)	.0021

801d

THE GREAT ATLANTIC & PACIFIC TEA COMPANY

DAIRY PRODUCTS SALES

W/E 12/25/65

1st week of 100% private label

UNIT SALES

POINTS

STORE DELIVERY	UNIT SALES 1965	UNIT SALES 1964	POINTS 1965	POINTS 1964
Gallons Homo - Glass	18,040	21,009	75,360	87,236
Gallons Homo - Paper	000	22,990	3,832	91,992
Gallons Homo - Paper P.L.	20,901	---	88,004	---
½ Gallons Homo	61,458	139,267	222,070	278,374
½ Gallons Homo - P.L.	56,143	---	112,286	---
Quarts Homo	15,410	45,992	15,410	45,992
Quarts Homo - P.L.	24,000	---	24,000	---
Quarts Skim	2,439	7,672	2,439	7,672
Quarts Skim - P.L.	4,000	---	4,000	---
Gallons 2% Skim	4,552	6,230	18,208	24,944
½ Gallons 2% Skim	6,003	20,217	12,006	40,434
½ Gallons 2% Skim - P.L.	9,609	---	19,218	---
½ Gallons Gail Borden	---	6	---	18
½ Gallons Fort. Skim	3,093	10,427	6,186	20,854
½ Gallons Fort. Skim - P.L.	6,401	---	12,802	---
TOTAL			514,332	597,516
½ Gallons Choc. Skim	2,540	1,000	5,080	3,936
Quarts Choc. Milk	1,013	3,000	1,013	3,000
Quarts Choc. Milk - P.L.	2,001	---	2,001	---
½ Pints Choc. Milk	000	1,330	285	305
½ Pints Elsie Shake	2,201	---	000	---
½ Gallons Buttermilk	1,024	7,240	2,048	14,290
½ Gallons Buttermilk - P.L.	4,100	---	8,200	---
Quarts Buttermilk	2,000	12,120	2,000	12,120
Quarts Buttermilk - P.L.	5,975	---	5,975	---
TOTAL			27,042	34,339
Pints Half & Half	14,399	44,000	28,798	89,000
Pints Half & Half - P.L.	18,925	---	37,850	---
Quarts Half & Half	1,755	3,000	7,020	3,000
Pints Half & Half Soured	5,005	5,016	10,010	11,032
- ½ Pints Whipping Cream	1,230	27,422	1,230	27,422
½ Pints Whipping Cream - P.L.	22,476	---	44,952	---
Cartons Sour Cream 16 oz.	7,360	8,853	14,720	17,706
Cartons Sour Cream 8 oz.	13,329	17,703	13,329	17,703
7 oz. Triple Whip	6,659	5,056	6,659	5,056
8 oz. Dips	7,950	9,990	7,950	9,990
TOTAL			150,033	184,667
½ Gal. Egg Nog	---	5,000	---	70,000
½ Gallons Fruit Drinks	100	70	200	140
Quarts Fruit Drinks	87	117	87	117
Quarts Beep	68	135	68	135
Quarts Egg Nog	15,369	32,770	61,476	131,080
Qts. ~~XXXXXXXX~~ Egg Nog - P.L.	9,115	---	36,460	---
Yogourt	2,317	2,387	2,317	2,387
Pts. Wake-Up	504	---	1,008	---
Cartons Cheese 16 oz.	2,772	3,135	2,772	3,135
Cartons Cheese 8 oz.	379	353	189	177
2# Cheese	1,658	1,000	3,316	3,722
Dry Cheese	164	132	164	132
TOTAL			125,296	211,505
GRAND TOTAL			666,583	1,028,227

12 Items Private Label Points = 370,740
12 Items Borden Label Points = 262,337
Total Points = 633,077

58.56% Private Label to Total Points

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CX .79

FILE MEMO

5/25/66

ESTIMATED INCREASED COST FACTORS

Re: May-1966 Selling Price Change
Chicago - Calumet Area

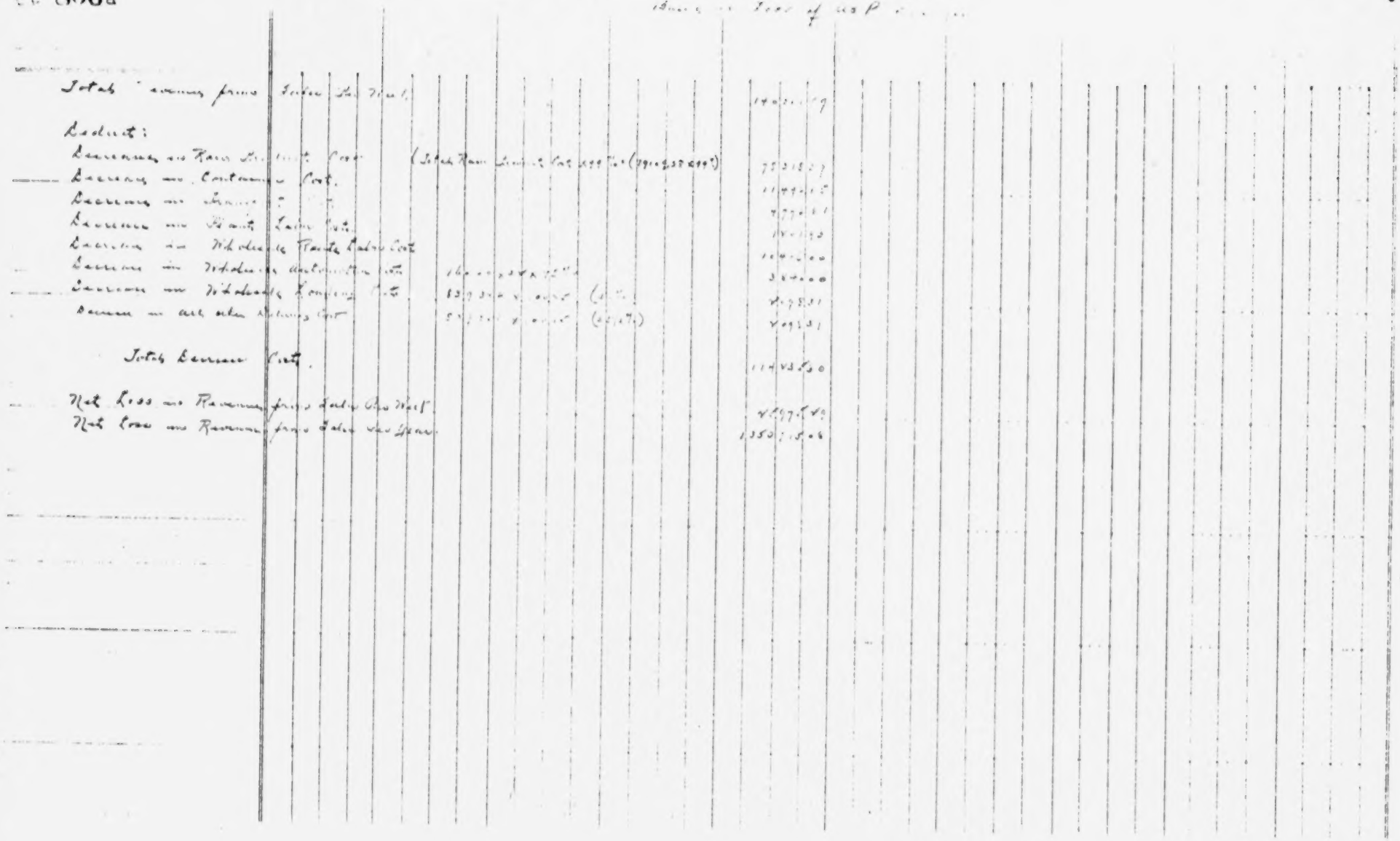
	Estimated Average Increased Cost Per Points Sold
Increase in 1966 Union Contract Changes (Includes Wage Rates - Welfare - Pensions and Fringe changes) (Inside Workers up $.253 per hour) (Drivers up $3.00 per week)	$ .001345
Increase in 1965 Union Contract Changes (Includes Wage Rates - Welfare - Pensions and Fringe changes) (Inside Workers up $.10 per hour) (Drivers up $3.50 per week)	.000955
Sub-Total Labor	.002300
Increase in Pure-Pak Container Cost - August-1965 (Gals. - .0028 1/2 Gals. - .00143 Qts. - .00082)	.000725
Increase in Social Security Taxes - 1966 1966 - $277.20 1965 - $174.00 per employee	.000320
Total	$ .003345

Note: Except for the price change of 2/2/66 of a cent per quart, list prices on fluid milk -- gallons, half gallons, quarts, etc. -- have been unchanged since October 13, 1964. The Feb. 2, 1966 price change only reflected the change in superpool costs ($.30 increase per cwt. = .007 per quart) ($.01 change in list less maximum discount of 30% = $.007 per quart).

During this period, maximum discount rates have changed from 23% to 30% of the list price.

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87C



4/29/66

would not that was wrong since the saving of the Woodstock plant with high gasoline plant and transport costs and that the comparison of total wages costs would not disclose the real facts. The reduction totals labor costs per pound have been affected by increased distribution volume which has no relation to A&P which volume decrease most of the persons declined.

Persons further the schedules developed which disclosed the low position of our A&P business were the estimated low wages of our test the Chain's A&P business. Explaining the three different schedules and the cost accounting philosophy considered.

Each of persons were satisfied with the facts - did not feel that Smith would be receptive to recognizing the wage rate increase per se and would have to continue to feel his way along.

He indicated he would like to have the wage documentation - told how we considered doing so but that Ralph thought, that facts a personal confrontation of the facts would be better - Advised Jack we would put the project in a report form.

pc

6/29/66

File Memo
A&P

Reviewed with Jack Pentz and Bob Comfort data developed which supported the proposed selling price increase of .0035 per point resulting from increased labor costs and container cost.

Indicated that the labor cost factor was developed on a very detailed basis - man by man - covering the week of 5/28/66 which week was used because it was the first week payroll that contained the changed rates and other contract changes including job reclassification embodied in the new contract which became effective as of 5/1/66 - Local 154.

Reviewed the schedule developed which showed the increase in wage cost incl. fringes to represent and increase cost per point of $.00293. The schedule showed by principal classification the basic hourly or weekly wage rate of in effect during February 1965 and May 1966 and the hourly and/or weekly increases between such periods.

Discussion of this increased per point cost occurred. It was pointed out that the terms and conditions that accompanied our price proposals of November 1965 contained

807a

4/28/66 A

Jack Mann

to P

Reviewing with Jack Berg and Bob Long of data developed which supports the progress billing price increase of 2.5% per pound resulting from increasing labor costs and continuing cost.

Indicates that the labor cost factor was developed on a very detailed base - mostly manual covering the week of 5/28/66 which work was used because it was the first week payroll that contained the changes rates and other contract changes including job reclassification under the new contract which became effective as of 5/1/66 - Book 154.

Reviews the schedule developed which shows the increase in wage rate only, prior to agreement and increase cost per pound of 2.5%. The schedule shows by grouped classifications the base hourly & weekly wage rate in effect during February 1965 and May 1966 and the hourly and weekly increases between each periods.

Discussion of the increased per pound cost occurred. It was pointed out that the terms and conditions that accompanied our price proposal of November 1965 contained reference to labor and continue cost increase although these cost factors were not automatic as in the case of some product costs which were tied to a formula.

Jack felt that this was all very fair but indicated that to the week ending that would be mainly considered which were the actual labor cost back increase which included duty and all differences and that they would not literally look to wage rate increase but to overall wage costs. It was pointed out that during the period of negotiations

90 D

references to labor and container cost increases although these cost factors were not automatic as in the case of raw product costs which were tied to a formula.

Jack felt that this was all very fine but indicated that the real issue that would be raised considered what were the actual labor cost load increase which included any and all efficiencies and that they would not basically look to wage rate increases but to overall wage costs. It was pointed out that during the period of negotiation with A&P that we were going thru the opening of the Woodstock plant with high opening plant and transport costs and that the comparison of total wage costs would not disclose the real facts. In addition total labor costs per point having been affected by increased distributor volume which has no relation to A&P which volume during most of the period decreased.

Reviewed further the schedules developed which disclosed the loss position of our A&P business and the estimated loss in revenue if we lost the Chicago A&P business. Explained the three different schedules and the cost accounting philosophy considered.

Jack it appeared was satisfied with the facts - did not feel that Smith would be receptive to recognizing the

wage rate increase per se and would have to continue to feel his way along.

He indicated he would like to have the review documented - told him we considered doing so but that Ralph thought, first a personal confrontation of the facts would be better - Advised Jack we would put the project in a report form.

CX 102A
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THE BORDEN COMPANY
CHICAGO REGION
1821 S. KILBOURN AVENUE
CHICAGO, ILLINOIS 60623

AREA CODE 312 277-6400

March 13, 1967

Mr. E. R. Schmidt
The Great A & P Tea Company
2622 N. Pulaski Road
Chicago, Illinois 60639

Dear Mr. Schmidt:

When I visited with you last Friday with regard to the changes occurring in the Class I milk price, we brought up again the price adjustments of $.0035 per point to compensate for the increases that have occurred in the cost of labor and containers prior to June of 1966. You will recall that our proposal to supply you with private label milk definitely contemplated that we were to pass on to you any changes that occurred in the cost of labor and containers. There is little doubt in our minds that we had a mutual understanding on this point.

The present union contracts in force covering the majority of processing and distribution personnel have been effective since May 1, 1966 and were consummated as the result of labor-management negotiations. The end result of such contract settlement with the principal unions, together with the agreements reached with other miscellaneous unions, resulted in a total wage cost package that increased our wage cost at wholesale by $.00296 per point. This increased cost per point is inclusive of the changes in the basic hourly and weekly wage rates, additional costs brought about by certain reclassification of jobs, extension of eligible vacation periods, increases in the employer contributions covering pensions and health and welfare and the increase that occurred in the employer Social Security contributions.

During this same period the cost of containers used to package fluid milk products increased $.000725 per point. The increase differed as to container sizes, but the $.000725 per point increase results from applying the A & P volume utilization for each size to each respective size container increase and arriving at a volume weighted cost per point.

The total of the foregoing labor and container cost increases amounts to $.003685 per point sold. As you know, we passed on this increase to our

1021

1023

1988

Mr. E. R. Schmidt
The Great A & P Tea Company

March 13, 1967

X customers purchasing Borden label products, such increase representing the equivalent of $.0035 per point.

We indicated last Friday to you that it is most necessary to make effective this increase of $.0035 per point, which change we request be applicable as of March 20, 1967. We feel sure that upon review you will concur with us in this regard.

We want you to know that we are most grateful for the opportunity to serve you.

Sincerely,

Orville P. Gose

* Dairy absorbed .0050 on strength of Union Contract. Can be substantiated

Increase radial	.0035
Contains Cont	.000725
Diam. of hub at shoulder	.00275
Total Take Up	.00296
Die metal	.00275
Broken shearing	.000185

CX 103 B

March 21, 1967

Mr. H. H. Schmidt
The Great A & P Tea Company
2622 N. Kolonki Road
Chicago, Illinois 60639

Dear Mr. Schmidt:

When we visited with you yesterday and discussed further our letter to you under date of March 13, 1967 regarding the increase in labor and container costs, you requested additional supplementary information in this regard.

The Union contract negotiated which became effective generally as of May 1, 1966 brought about the following basic increases:

Job Classification	Increase Rate per Hour
General Production Workers	$ .2050
Reclamation Occupation	.2625
Machinists	.1750
Mechanics	.1750
Engineers	.1750
Office Employees	.2000
Loaders	.2000
Wholesale Routemen ($6 per week)	.1500
Transport Drivers ($6 per week)	.1500
Fringe Benefits:	
Employer Contributions - Pension and Health & Welfare - Local 734	.085
Health & Welfare Contributions - Local 753	.025

In addition, vacation benefits were extended, inside workers currently attain a maximum of 5 weeks after 15 years of service, and wholesale drivers, transport workers, etc., attain a maximum of 4 weeks vacation after 15 years of service.

103 C

As you will know, the employer contributions under the Federal Social Security program increased from $174.00 per year to $277.20 per year.

The increased wage cost per point at wholesale we indicated amounted to $.00296 per point and represented the following:

Wages	58.3%
Vacation Expense	10.6%
Pension & Welfare Expense	13.9%
Social Security Contributions	17.2%
Total	100.0%

At this time our average wage cost per point sold at wholesale, exclusive of commissions and non-union and supervisory, administrative and executive personnel amounts to $.03441 per point. This represents an increase of $.00296 per point.

During this period we also advised you that our basic carton cost increased $.000725 per point as follows:

Gallon Purpak containers	Increased	$.002000
Half gallon Purpak containers	"	.001430
Quarts Purpak containers	"	.000830
Pints Purpak containers	"	.000590
Half Pints Purpak containers	"	.000470
Average		$.000725

The above indicated average is not an arithmetic average but was weighted to represent A & P volume requirements of each size container.

We again call to your attention that our proposal to supply you with private label milk definitely contemplated that we were to pass on to you any increases in labor or container costs. We trust that the foregoing adequately explains these increases.

Your continued patronage is greatly appreciated.

Sincerely,

Orville P. Cone

THE BORDEN COMPANY
CHICAGO METROPOLITAN REGION
1821 S. KILBOURN AVENUE
CHICAGO, ILLINOIS 60623

March 21, 1967

AREA CODE 312 277-6400

Mr. E. R. Schmidt
The Great A & P Tea Company
2622 N. Pulaski Road
Chicago, Illinois 60639

Dear Mr. Schmidt:

When we visited with you yesterday and discussed further our letter to you under date of March 13, 1967 regarding the increase in labor and container costs, you requested additional supplementary information in this regard.

The Union contract negotiated which became effective generally as of May 1, 1966 brought about the following basic increases:

Job Classification	Increase Rate per Hour
General Production Worker	$ .2050
Reclassified Occupation	.2625
Machinists	.1750
Mechanics	.1750
Engineers	.1750
Office Employees	.1750
Loaders	.2000
Wholesale Routemen ($6 per week)	.2000
Transport Drivers ($6 per week)	.1500
	.1500

Fringe Benefits

Employer Contributions - Pension and Health & Welfare - Local 754	.085
Health & Welfare Contributions - Local 753	.025

In addition, vacation benefits were extended, inside workers currently attain a maximum of 5 weeks after 15 years of service, and wholesale drivers, transport workers, etc., attain a maximum of 4 weeks vacation after 15 years of service.

CX 103D

00038

Barber

Calc
4/56 Act Rate Cert for Paint .03115

Mgt Insurance ✓ - .0029

Direct Mgt Ins ✓ ✓ .003469

% of Insurance in Mgt 9.4%

Mgt Insurance .00296

Cotton ✓ .000725

Total ✓ .003685

Barber Insurance to Acct .00311 4/56

Barber to Clerk .000185

4/56 Cert to Acct: Standard Labor Rate Negotiated

Mgt Hrs 75,000 hrs 4/56

Conv Index .0035

Cert Amt $2625.00

12 Dec Information IKB & R.W. collection matter w/n 4/56 4/5

CX 103-F

821a

THE BORDEN COMPANY
CHICAGO REGION
1821 S. KILBOURN AVENUE
CHICAGO, ILLINOIS 60623

AREA CODE 312 277-6400

245

March 30, 1967

Mr. E. R. Schmidt
The Great A & P Tea Company
2622 No. Pulaski Road
Chicago, Illinois 60639

Dear Mr. Schmidt:

Pursuant to the request for additional wage cost data made by Mr. Robert Witzke in connection with our letters to you under date of March 13th and March 21st, 1967, we have enclosed the following schedules:

Schedule (I) Schedule Showing by Major Job Classification and Type of Expense, Hourly Wage Cost Increases Effective May, 1966

Schedule (II) Schedule Showing Comparison of Union Wage Rates by Major Classification, May 1966 Compared to May 1965

Schedule I indicated above provides in detail the factors comprising the increased rate per hour covering the various job classifications as set forth in our letter of March 21, 1967. In this regard it is our opinion that the various costs are set forth on a conservative basis. For example, the continuing years of service on the part of employees bring about in a routine manner additional vacation expense which accumulates with years of service and is not computed as a specific item. The increased vacation cost per hour only represents the additional cost due to the granting of an additional week's vacation. The matter of days off for jury duty, funeral pay, sick leave, are also difficult to calculate specifically and have been omitted from our developed increased costs, but do reflect their cost image in the total cost of doing business. Also, in some specific areas the increased cost brought about by the reclassification of jobs imposed an increase of 36.6¢ per hour.

Schedule II shows a comparison of base union wage rates between May 1966 and May 1965 by the major classifications set forth in our letter of March 21, 1967.

In our letters of March 13, 1967 and March 21, 1967 we have indicated 00096 our overall increased wage cost at wholesale amounted to $.00296 per point.

105 B
244

Mr. E. R. Schmidt
The Great A & P Tea Company

March 30, 1967

The 1966 Dairy Employees Union wage contract as finally consummated contained a number of changes, all of which had considerable emphasis upon our costs. These changes represented increasing the night differential rate by2.8%, the inclusion of new classifications not formerly covered by the contract; the reclassification of certain jobs at higher pay levels; the extension of vacation pay to cover an additional week together with the eligibility for three weeks vacation instead of two weeks after one year of service; reduction in the retirement age eligibility from 62 years to 60 years with an increase in the employer contribution of 3.5 cents per hour; changes in health and welfare which provide greater coverage for members, and other requirements, all of which are in addition to the basic hourly increased rate. Also, as we have previously advised, the changes in the Social Security Act which became effective on January 1, 1966 increased our costs the equivalent of 4.9 cents per hour.

We have attempted to compute these increased payroll costs in a reasonable manner. As we have indicated in our letter of March 13, 1967, this increase has already been passed on to our customers purchasing Borden label products.

We sincerely hope that this information will allow for the affirmative conclusion of the matter this week in accordance with our proposal to supply you with private label milk, which proposal definitely contemplated that we were to pass on to you any increase in labor or container costs.

Your continued patronage is greatly appreciated.

Sincerely,

O. P. Gose
The Borden Company

THE BORDEN COMPANY
CHICAGO REGION

3/29/67

105 C
242

Schedule II

Schedule Showing Comparison of Union Wage Rates by Major Classifications

May 1966 Compared to May 1965

Classification	1965 Subsequent to 5/1/65		1966 Subsequent to 5/1/66	
	Per Week	Per Hour	Per Week	Per Hour
General Production Worker	$132.50	$ 3.3125	$136.50	$ 3.4125
Machinists	179.00	4.4750	182.00	4.5500
Mechanics	153.60	3.8400	156.60	3.9150
Engineers	166.40	4.1600	169.40	4.2350
Office Employees-Clerks	126.00	3.1500	130.00	3.2500
Wholesale Routemen	134.10	3.3525	136.60	3.4150
Transport Drivers	141.10	3.5275	143.60	3.5900

THE BORDEN COMPANY
CHICAGO REGION

3/29/67

Schedule I

Schedule Showing by Major Job Classification and Type of Expense, Hourly Wage Cost Increases Effective May, 1966

Classification	Basic Hourly Wage Rate	Increased Cost per Hour Due to: Vacations	Pensions and Welfare	Social Security	Job Reclassification Nite - Sunday Premiums, etc.	TO
		(1)				
General Production Workers	.1000	.0370	.0350	.0500	.0330	.25
Reclassified Occupation	.1000	.0370	.0350	.0500	.0905	.31
Machinists	.0750	.0370		.0500	.0130	.17
Mechanics	.0750	.0370		.0500	.0130	.17
Engineers	.0750	.0370		.0500	.0130	.17
Office Employees	.1000	.0370	.0350	.0500	.0280	.25
Wholesale Routemen	.0630	.0370	.0125	.0500		.16
Transport Drivers	.0630	.0370	.0125	.0500		.16

(1) Computed on an average basis.

80003

CA-1-110

303

11/4/67

Patterson

Orville ended by thinking the question concluded their meeting with Bartels. He then reviewed the matter on the basis of our calculations of the growing recognition to him (Bartels) for pensions and government, welfare and social security.

In the course of the matter he came about talking about .0019 comparing to our recalculation of .0010. At one point he asked Orville to check again with Melvin, going back to the approach of a 100,000 - pay roll and a 4% rate increase. Went then the mechanics of the figures indicating to Orville that when Bartels was talking about a 4% increase he was then referring to the base rate change. The total amount of the increase cost of Orville's two pensions, welfare and social security amounted to $187.37 of which approximately 75% accrued to A.T.&T. $196.81 per week. Divided by the 604,000 payments, these represented an increased cost of .00031 per point. Taking the matter a step further to reconcile the figure, the elimination of pensions welfare and social security reduced the total wage cost factor on a weighted basis by 31%. The former originated figure of .00196 x 69% = .00101 - then was the basis of our revised cost increase.

Further discussions involved around Bartels' new figure of .0019 and our indicated factor of .0010 per point. At one juncture Orville indicated that he would not perform the discussions and wanted to look at the .0019 per point of the matter could be concluded. The discussions continued and it was indicated that Orville was to call Bob Wright the first thing



110 C

Patterson

4/4/67

Orville called - they had justed [just] concluded their meetings with Bartels. He had reviewed the matter on the basis of our calculations after giving recognition of his (Bartels) position on pensions, welfare and social security.

In the review of the matter he came about talking about .0019 compared to our recalculation of .0020. At one point he asked Orville to check again with Malone, going back to his appraisal of a $100,000 - payroll and a 4% rate increase. Went thru the mechanics of the figures indicating to Orville that when Bartels was talking about a 4% increase he was then referring to the basic rate change. The total amount of the increased cost of payrolls less pensions, welfare and social security amounted to $5187.37 of which approximately 25% accrued to A&P or $1296.84 per week. Divided by A&P's 604,000 points, this represented an increased cost of .0021 per point. Taking the matter a step further to reconcile the figure, the elimination of pensions, welfare and social security reduced the total wage cost factor on a weighted basis by 32%. The former computed figure of .00296 X 68% - .0021 - this was the basis of our revised cost increase. Further discussion revolved around Bartel's new figure of .0019 and our indicated factor of .0020 per point.

830a

DELIVERY REQUIREMENTS

1. Deliveries will be on a limited service basis as follows:

   a) Stores served on a six-day per week basis will receive one delivery per day.

   b) The delivery time to each store will be handled in a manner to effectuate the most efficient delivery schedule.

   c) Special deliveries shall not be made except in unusual instances, such as Borden's failure to perform on the advance order.

2. Deliveries at the store level shall be handled in the following manner.

   a) To the receiving door of the store.

   b) To a designated place on the receiving platform.

   c) To a refrigerated storage box that can be entered directly from a platform or ground level location and into which dairy products can be conveniently stocked.

   d) If dairy products are delivered to a refrigerated storage box, adequate storage space shall be provided so that proper rotation of carry-over merchandise can be handled by store personnel.

   e) Empty milk cases and bottles shall be placed at a designated point for easy accessibility and pickup.

3. Ordering of Products.

   a) Advance order delivery tickets shall be supplied by The Borden Company.

   b) Advance order tickets for the following delivery shall be completed for presentation to the Borden driver at time of delivery.

4. Credit for Product Returns

   a) Credit for product returns shall be only on the basis of faulty containers or product remaining within code date.

5. Borden's will not be obligated to furnish any merchandising materials, price promotions, demonstrators, or special displays on private labeled products under this program.

At one juncture Orville indicated that he would not prolong the discussion and would look at the .0019 per point if the matter could be concluded. The discussion continued and it was indicated that Orville was to call Bob Witzke the first thing and confirm the .0020. Bartels inquired if this factor included the container and was advised "no" but he indicated that from the point of view they were a part of the adjustment. He also inquired of Orville as to what this .0020 adj. of P. L. compared to the name brand did to any legal position - Orville indicated he did not feel our position was any different legally from where it was before the P. L. adjustment.

Bartels was very cordial, indicated that he recognized our problems - they too had real ones - sometimes it was most difficult to explain to others comparing other area prices with Chicago the factors that he knew existed.

The meeting ended in good cordial relations between the parties.

A

CX 123 A

THE BORDEN COMPANY
CHICAGO METROPOLITAN REGION
1821 S. KILBOURN AVENUE
CHICAGO, ILLINOIS 60623

AREA CODE 312 277-6400

January 3, 1966

Dear Grocer:

We are constantly studying our costs and methods of doing business with you in the interest of providing not only the outstanding in quality and service, but also, passing on to you from time to time in our pricing program, further cost savings that develop.

We are now offering to you and other similar retailers additional discounts based upon the acceptance by you of the optional services as hereinafter set forth:

(1) Retailers participating on an advance order, no special delivery program, with deliveries to the receiving door of the store; to a designated place on the loading platform or to a refrigerated storage box; purchasing 150 or more points per delivery will receive an additional 1% discount.

(2) Retailers participating on a basis of no credit for returned merchandise, except for faulty containers or product, will receive an additional 1% discount.

With your acceptance of this program, we are passing on to you and other similarly situated retailers an additional discount of 2% from your monthly billings, which is in addition to the applicable rate per our discount schedule and which discount will be included and sent to you with your regular monthly discount check.

We assure you we appreciate your patronage.

Yours very truly,

THE BORDEN COMPANY
HAMMOND BRANCH

GENERAL SALES DEPARTMENT

Accepted_____

Date_____

FRESH MILK PRODUCTS

FOOD STORE AND GROCER'S DISCOUNT SCHEDULE

Average Units Purchased Per Delivery	Discount Schedule
0 - 149	13%
150 - 199	15%
200 - 249	17%
250 - 299	19%
300 - 349	21%
350 - 399	22%
400 - 449	23%
450 - 499	24%
500 - 549	25%
550 - 599	25-1/2%
600 - and over	26%

OPTIONAL SERVICES

(1) Stores participating on an advance order, no special delivery program, with deliveries to the receiving door of the store; to a designated place on the loading platform or to a refrigerated storage box, purchasing 150 or more points per delivery will receive an additional 1%.

(2) Stores participating on a basis of no credit for returned merchandise, except for faulty containers or product, will receive an additional 1%.

THE BORDEN COMPANY
HAMMOND BRANCH

123 c

205 c

CX 138

FRESH MILK PRODUCTS

FOOD STORE AND GROCER'S DISCOUNT SCHEDULE

EFFECTIVE JANUARY 1, 1966

Average Units Purchased Per Delivery	Discount Schedule
0 - 149	13%
150 - 199	15%
200 - 249	17%
250 - 299	19%
300 - 349	21%
350 - 399	22%
400 - 449	23%
450 - 499	24%
500 - 549	25%
550 - 599	25-1/2%
600 and Over	26%

OPTIONAL SERVICES

(1) Stores participating on an advance order, no special delivery program, with deliveries to a refrigerated storage box or dairy case, purchasing 150 or more points per delivery will receive an additional 1%.

(2) Stores participating on a basis of no credit for returned merchandise, except for faulty containers or product, will receive an additional 1%.

THE BORDEN COMPANY
Chicago Metropolitan Region

159
Table
25

ember 11, 1968

	Woodstock
	.6517
	.3453
	.1796
	.6907
	.3175
	.1[illegible]8
	.3008
	.3[illegible]3
	.1796
	.2[illegible]8
	.2316
	.0930
	.3175
	.2595
	.4985
	.2836
	.4674
	.2390
	.2789
	.1963
	.4089
	.3[illegible]58
	.4001 **
	.[illegible]1[illegible]

REGION
3 D

160

THE BORDEN COMPANY

November 30, 1964

PRICES TO THE GREAT ATLANTIC & PACIFIC TEA COMPANY

Page Change No. 26

Effective November 15, 1964

AREA No. 1 SUPPLEMENT

CHICAGO AND CALUMET AREAS

834a

MILK E PRODUCTS	SIZE	All Stores Except as noted	McHenry Crystal Lake Fox Lake Woodstock Zion Antioch Wauconda
HOMO V.D. MILK Glass	Gal.	.6510 *	.6498 *
" " "	½ Gal.	.3430 *	.3422 *
" " "	Qt.	.1855 *	.1851 *
" " "Paper	Gal.	.6860 *	.6844 *
GAIL BORDEN	½ Gal.		
Gold-N-Del Glass	Gal.	.6090 *	
GOLD-N-DEL	½ Gal.	.3220 *	.3212 *
FORTIFIED SKIM	Qt.	.1785 *	.1781 *
" "	1/2Gal.	.3220 *	.3212 *
BUTTERMILK	½ Gal.	.3430 *	.3422 *
	Qt.	.1855 *	.1851 *
tch Choc. Milk	4-1/2Pts.	.2380 *	.2376 *
DUTCH CHOCOLATE MILK	Qt.	.2240 *	.2236 *
CHOCOLATE SHAKE	½ Pt.	.0930	.0930
n Choc. Skim	1/2 Gal.	.3220 *	.3212 *
HALF & HALF	Pt.	.2730 *	.2726 *
" "	Qt.	.5390 *	.5382 *
WHIPPING CREAM	½ Pt.	.2800	.2796 *
SOUR CREAM	16 oz.	.4445 *	.4437 *
" "	8 oz.	.2275 *	.2271 *
SOUR CREAM DIP	8 oz.	.2695 *	.2691 *
YOGURT	8 oz.	.1890 *	.1890 *
TRIPLE WHIP	8 oz.	.3710 *	.3710 *
our Hanf & Half	Pt.	.3255 *	.3251 *
EGG NOG	Qt.	.3990 *	.3990 *
Beer	Ct.		
ORANGE & Fruit Dri	½ Gal.	.2581	
"	Qt.	.1490	
FRUIT PUNCH	½ Gal.		
ffee Wake-U	Pt.	.2108	.2103

* Asterisk denotes price change
Asterisk denotes new numeration

These prices are available to all on a proportionately equal basis

THE BORDEN COMPANY — CHICAGO METROPOLITAN REGION

Bottle Deposit

Gallons 15 ½ Gallons Quarts

CX 153 E

836a

The Borden Company - Chicago

Comparative Statement of Profit and Loss Before Taxes for the Chicago Metropolitan Milk Operation for Each Calendar Month of 1965, the Total Twelve Months of 1965, and for Each of the First Eight Months of 1966. 1/

	January		February		March		April		May		June	
Sales Volume (Pounds)	37,498,907		30,297,166		30,540,698		37,232,113		29,399,401		28,977,733	
	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt
Net Sales	$ 3,210,110	$8.56	$ 2,599,753	$8.58	$ 2,633,936	$8.62	$ 3,199,631	$8.59	$ 2,522,114	$8.58	$ 2,444,354	$8.55
Cost of Products Sold	2,291,513	6.11	1,878,821	6.20	1,921,986	6.29	2,307,466	6.19	1,766,521	6.01	1,745,081	6.10
Gross Profit	918,597	2.45	720,932	2.38	711,950	2.33	892,165	2.40	755,593	2.57	699,313	2.45
Operating Expenses:												
Advertising	25,512	0.07	6,121	0.02	2,018	0.01	25,657	0.07	20,076	0.07	20,070	0.07
Credit, Collection, Selling & Delivery	768,179	2.05	617,895	2.04	597,066	1.95	736,209	1.98	588,079	2.00	571,026	2.00
Administrative	33,439	0.09	27,517	0.09	26,696	0.09	33,636	0.09	25,213	0.08	(601)	0.00
Total Operating Expenses	827,130	2.21	651,533	2.15	625,780	2.05	795,502	2.14	633,368	2.15	590,495	2.07
Net Profit (Loss) Before Taxes	91,467	0.24	69,399	0.23	86,170	0.28	96,663	0.26	122,225	0.42	108,818	0.38

1/ Calendar Year 1965 is reported on accounting periods of 5-4-4 weeks each quarter; 1966 reported on calendar month basis.

FEDERAL TRADE COMMISSION
Docket No. 8836 COMMISSION Exhibit No. 206A
In the Matter of: A&P
Date 11/1 Witness _____ Reporter ERC

CX 206 A

835a

835a

CX 185

Comparison of Borden Company Weekly Billings, by Point Value, of Products Covered by the Private Label Arrangement Purchased by A & P in Chicago and Suburbs Area Under Both Private Label and Borden Label during Selected Periods from November 1965 to December 1968.

Week Ending	Private Label Products Purchased	Percent of Total	Borden Label Purchases of Identical Products	Percent of Total	Total Points
11/20/65	169,047	47.9%	183,659	52.1%	352,70
12/11/65	162,232	45.4	195,451	54.6	357,68
1/8/66	240,518	59.9	161,028	40.1	401,54
2/5/66	212,851	61.4	134,065	38.6	346,91
3/5/66	192,454	58.7	135,379	41.3	327,83
4/9/66	207,802	59.1	143,958	40.9	351,76
5/7/66	243,574	60.5	159,254	39.5	402,82
6/11/66	243,544	61.7	151,339	38.3	394,88
7/9/66	220,391	62.9	130,093	37.1	350,48
8/6/66	258,128	63.0	151,403	37.0	409,53
9/3/66	270,465	63.9	152,978	36.1	423,44
10/8/66	357,168	100.0	2 (CR)	0	357,16
10/22/66	386,339	100.0	0	0	386,33
11/5/66	385,318	99.9	91	.1	385,40
11/19/66	389,621	99.9	393	.1	390,01
12/10/66	375,291	100.0	11	0	375,30
12/24/66	440,018	99.9	58	.1	440,07
1/7/67	368,007	99.9	339	.1	368,34
1/21/67	357,621	99.9	150	.1	357,77
2/4/67	428,060	98.1	8,094	1.9	436,15
2/18/67	382,858	99.9	108	.1	382,96
3/4/67	377,707	99.9	32	.1	377,73
3/25/67	381,050	99.9	419	.1	381,46
4/1/67	324,030	99.9	21	.1	324,05
4/15/67	351,751	99.9	26	.1	351,77
4/22/67	336,263	99.9	61	.1	336,32
5/6/67	331,876	99.6	1,371	.4	333,24
5/20/67	309,122	99.8	352	.2	309,47
6/10/67	368,963	99.9	154	.1	369,11
6/24/67	363,321	99.9	161	.1	363,48
7/8/67	340,751	99.9	32	.1	340,78
7/22/67	351,453	100.0	16	0	351,46
8/5/67	363,149	99.9	111	.1	363,26
8/19/67	355,105	99.9	132	.1	355,23
9/9/67	341,615	99.9	24	.1	341,63
10/7/67	407,627	100.0	0	0	407,62
11/4/67	397,112	100.0	0	0	397,11
12/9/67	405,175	100.0	0	0	405,17
1/6/68	369,142	100.0	0	0	369,14
2/10/68	355,587	100.0	0	0	355,58
3/9/68	346,929	100.0	0	0	346,92
4/6/68	327,581	100.0	0	0	327,58
5/4/68	238,651	100.0	0	0	238,65
6/8/68	320,189	100.0	0	0	320,18
7/6/68	314,434	100.0	0	0	314,43
8/10/68	295,361	100.0	0	0	295,36
9/7/68	288,872	100.0	0	0	288,87
10/5/68	325,757	100.0	0	0	325,75
11/9/68	313,700	100.0	0	0	313,70
12/7/68	334,357	100.0	0	0	334,35

Source: Borden Company Weekly Billings of A & P Store Summaries for Chicago and Suburbs Area.

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8.37a

Sales Volume (Pounds)	July 35,018,327		August 28,415,933		September 30,087,102		October 38,143,242		November 30,715,106		December 36,350,908		Total (12 Mos.) 392,270,696	
	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt
Net Sales	$ 2,969,310	$8.48	$ 2,416,025	$8.50	$ 2,565,020	$8.52	$ 3,243,166	$8.50	$ 2,541,197	$8.27	$ 3,114,076	$8.56	$ 33,458,732	$8.53
Cost of Products Sold	2,183,586	6.24	1,770,849	6.23	1,872,014	6.22	2,365,737	6.20	1,913,792	6.23	2,087,512	5.74	24,104,878	6.14
Gross Profit	785,724	2.24	645,176	2.27	693,006	2.30	877,429	2.30	627,405	2.04	1,026,564	2.82	9,353,854	2.39
Operating Expenses:														
Advertising	24,574	0.07	19,803	0.07	11,048	0.04	26,322	0.07	5,981	0.02	(143,332)	(0.39)	43,850	0.01
Credit, Collecting, Selling & Delivery	708,157	2.02	583,423	2.05	609,204	2.02	718,496	1.88	593,630	1.93	719,965	1.98	7,811,329	1.99
Administrative	27,164	0.08	10,290	0.04	20,606	0.07	33,519	0.09	19,253	0.06	790	0.00	257,522	0.07
Total Operating Expenses	759,895	2.17	613,516	2.16	640,858	2.13	778,337	2.04	618,864	2.01	577,423	1.59	8,112,701	2.07
Net Profit (Loss) Before Taxes	25,829	0.07	31,660	0.11	52,148	0.17	99,092	0.26	8,541	0.03	449,141	1.23	1,241,153	0.32

FEDERAL TRADE COMMISSION
Docket No. 8826 Exhibit No. 226-P

CX 226 P

838a

	January 1966		February 1966		March 1966		April 1966		May 1966		June 1966		July 1966		August 1966	
Sales Volume (Pounds)	32,548,237		30,024,268		34,958,267		34,576,313		35,965,675		34,844,917		34,125,178		34,432,467	
	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt	Amount	Unit Amount Per Cwt
Net Sales	$ 2,703,896	$8.31	$ 2,528,537	$8.42	$ 2,957,905	$8.46	$ 2,924,023	$8.46	$ 3,024,462	$8.41	$ 2,930,212	$8.41	$ 2,901,674	$8.50	$ 3,022,302	$8.78
Cost of Products Sold	2,008,480	6.17	1,906,850	6.35	2,223,643	6.36	2,216,784	6.41	2,297,806	6.39	2,211,456	6.35	2,247,096	6.58	2,317,260	6.73
Gross Profit	695,416	2.14	621,687	2.07	734,262	2.10	707,239	2.05	726,656	2.02	718,756	2.06	654,776	1.92	705,042	2.05
Operating Expenses:																
Advertising	6,712	0.02	6,248	0.02	7,048	0.02	6,768	0.02	6,560	0.02	6,432	0.02	6,352	0.02	6,431	0.02
Credit, Collection, Selling & Delivery	637,454	1.96	630,561	2.10	674,725	1.93	658,911	1.91	678,620	1.89	686,273	1.97	670,732	1.97	659,061	1.91
Administrative	22,247	0.07	21,098	0.07	25,573	0.07	23,723	0.07	25,558	0.07	26,633	0.07	(3,015)	(0.01)	22,485	0.07
Total Operating Expenses	666,413	2.05	657,907	2.19	707,346	2.02	689,402	2.00	710,738	1.98	719,338	2.06	674,069	1.98	667,977	2.03
Net Profit (Loss) Before Taxes	29,003	0.09	(36,220)	(0.12)	26,916	0.08	17,837	0.05	15,918	0.04	(582)	0.00	(19,293)	(0.06)	17,065	0.05

Source: The Jordan Company submission to 1966 FTC Milk and Bread Survey.

FEDERAL TRADE COMMISSION
Docket No. 8866 Commission Exhibit No. 226C

CX 226 C

SCHEDULE OF LISTED ASSETS AND LIABILITIES
ITEMS INCLUDED ON PLANT OR DIVISION LEVEL -
BORDEN'S CHICAGO METROPOLITAN MILK OPERATION

	Year 1964 Total 12 Months	Year 1965 (Reported on period accounting of 5-4-4 weeks each quarter.) January	February	March	April	May	June
Sales Volume of Finished Products (Points)	186,672,551	17,441,352	14,091,705	14,205,069	17,317,262	13,674,168	13,291,909
Net Sales Value of Finished Products	34,307,161	3,210,110	2,599,753	2,633,936	3,199,631	2,522,114	2,444,394
Cost of Products Sold	24,388,713	2,291,513	1,878,821	1,921,986	2,307,466	1,766,521	1,745,081
Advertising Expense	121,950	25,512	6,121	2,018	25,657	20,076	20,070
Credit, Collection, Selling & Delivery Expenses	7,944,093	768,179	617,895	597,066	736,209	588,079	571,026
Administrative Expense	335,434	33,439	27,517	26,696	33,636	25,213	(601)

	Year 1965 (Reported on period accounting of 5-4-4 weeks each quarter.) July	August	September	October	November	December
Sales Volume of Finished Products (Points)	16,287,594	13,216,713	13,994,001	17,741,973	14,286,096	16,907,399
Net Sales Value of Finished Products	2,969,310	2,416,025	2,565,020	3,243,166	2,541,197	3,114,076
Cost of Products Sold	2,183,586	1,770,849	1,872,014	2,365,737	1,913,702	2,087,512
Advertising Expense	24,574	19,803	11,048	26,322	5,981	(143,332)
Credit, Collection, Selling & Delivery Expenses	708,157	583,423	609,204	718,496	593,630	719,965
Administrative Expense	27,164	10,290	20,606	33,519	19,253	790

	Year 1966 (Reported on calendar month accounting.) January	February	March	April	May	June	July	August
Sales Volume of Finished Products (Points)	15,138,715	13,964,776	16,259,659	16,082,006	16,728,221	16,206,938	15,872,176	16,015,101
Net Sales Value of Finished Products	2,703,896	2,528,537	2,957,905	2,924,023	3,024,462	2,930,212	2,901,874	3,022,[illegible]
Cost of Products Sold	2,008,480	1,906,850	2,223,643	2,216,784	2,287,000	2,211,453	2,247,093	2,[illegible]
Advertising Expense	6,712	6,248	7,048	6,768	6,560	6,432	6,352	6,[illegible]
Credit, Collection, Selling & Delivery Expenses	637,454	630,561	674,725	658,911	678,620	686,273	670,732	659,051
Administrative Expense	22,247	21,098	25,573	23,723	25,338	26,333	(3,022)	22,435

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.
MIDDLE WESTERN DIVISION – CHICAGO OFFICE
2622 N. PULASKI ROAD
CHICAGO, ILLINOIS, 60639

Mailing Address
P. O. BOX 6000-A
CHICAGO, ILLINOIS, 60680

841a

CX 863-A

October 1st 1965

Mr. Herschel B. Smith,
Headquarters Buying Department,
New York

Dear Mr. Smith:

Attached are proposals from The Borden Company and The Bowman Dairy Company to supply our Chicago Unit with A&P labeled dairy products, and in view of Borden's quotations, it is Chicago's intention to purchase supplies from them.

The Chicago Unit has requested approval to introduce A&P Milk as an additional item, and they will therefore carry present brands along with the A&P, at least temporarily, feeling that they could convert approximately 65% of their business to the A&P brand, which, incidentally, is our present experience in metropolitan St.Louis.

Mr.Vogel, Mr. Gamble and the writer concur with Chicago's thinking.

We will appreciate your early approval.

Very truly yours,

I.R.Bartels

IRB*EB

841a-1

CX 255 R

A & P Wholesale and Retail Price Changes For Selected A & P and Borden Label Milk Products
For Period January 1965 Through December 1968

Chicago and Suburbs Area

Price Change Effective Week Ending 1/	Specific Date 2/	Homo-Gallon-Paper A & P Label Wholesale	Homo-Gallon-Paper A & P Label Retail	Homo-Gallon-Paper Borden Label Wholesale	Homo-Gallon-Paper Borden Label Retail	Homo-1/2 Gallon-Paper A & P Label Wholesale	Homo-1/2 Gallon-Paper A & P Label Retail	Homo-1/2 Gallon-Paper Borden Label Wholesale	Homo-1/2 Gallon-Paper Borden Label Retail	Homo-Quart-Paper A & P Label Wholesale	Homo-Quart-Paper A & P Label Retail	Homo-Quart-Paper Borden Label Wholesale	Homo-Quart-Paper Borden Label Retail	2%-1/2 Gallon-Paper A & P Label Wholesale	2%-1/2 Gallon-Paper A & P Label Retail	2%-1/2 Gallon-Paper Borden Label Wholesale	2%-1/2 Gallon-Paper Borden Label Retail	Skim-1/2 Gallon-Paper A & P Label Wholesale	Skim-1/2 Gallon-Paper A & P Label Retail	Skim-1/2 Gallon-Paper Borden Label Wholesale	Skim-1/2 Gallon-Paper Borden Label Retail
1/2/65	6/																				
11/20/65	4/	$.6248	3/ $.89	$.7371	$.89	$.3124	3/ $.47	$.3685	$.47	$.1712	3/ $.26	$.20	$.26	$.2914	3/ $.45	$.3433	$.45	$.2834	3/ $.45	$.3453	$.45
	2/7/66		.93	$.6860	NC		.49	.3430	NC		.27	.1955	NC		.47	.3220	NC		.47	.3220	NC
2/12/66		.6508			.93	.3254		.3560	.49	.1777		.1920	.27	.3044		.3350	.47	.2964		.3350	.47
2/19/66		NC		.7120	5/	NC	NC	NC		NC	NC	NC		NC	NC	NC		NC		NC	
	2/21/66		.89		.89				NC				NC				NC		NC		NC
6/4/66		NC		.7260		NC		.3630		NC		.1955		NC		.3420		NC		.3420	
	6/20/66		NC		NC		NC		NC		NC		NC		.48		.48		.48		.48
	7/18/66		NC		NC		NC		NC		.28		.28		NC		NC		NC		NC
	7/25/66		NC		NC		NC		NC		NC		NC		.49		.49		.49		.49
	8/1/66		.93		.93		.51		.51		.29		.29		.51		.51		.51		.51
8/6/66		.6752		.7504		.3376		.3752		.1838		.2016		.3166		.3542		.3086		.3542	
	9/12/66		NC		NC		NC		NC		.28		.28		.49		.49		.49		.49
	9/19/66		.97		.97		.53		.53		.29		.29		.51		.51		.51		.51
9/24/66		.7028		.7780		.3514		.3890		.1907		.2085		.3304		.3680		.3224		.3680	
	9/26/66		.95		.95		NC		NC		NC		NC		NC		NC		NC		NC
10/29/66		.7068			5/	.3534			5/	.1917			5/	.3324			5/	.3244			5/
11/5/66		NC			5/	NC		.3910	5/	NC			5/	NC			5/	NC			5/
11/12/66		NC			5/	NC		NC		NC		.2095		NC			5/	NC		.3700	
11/19/66	6/	NC	NC		5/	NC	NC		5/	NC	NC		5/	NC	NC		5/	NC	NC	.3680	NC
11/26/66		.7028	NC		5/	.3514	NC	.3890	NC	.1907	NC	.2085	NC	.3304	NC		5/	.3224	NC		NC
1/7/67		NC	NC		5/	NC	NC	NC		NC	NC		5/	NC	NC		5/	NC	NC	.3700	
3/18/67		.6752	NC		5/	.3376	NC		5/	.1838	NC	.2085	NC	.3166	NC		5/	.3086	NC	NC	NC
4/15/67		.6832	NC		5/	.3416	NC		5/	.1858	NC		5/	.3206	NC		5/	.3126	NC		5/
4/22/67		NC	NC		5/	NC	NC		5/	NC	NC	.2016	NC	NC	NC		5/	NC	NC		5/
5/6/67		NC	NC	.7504	NC	NC	NC	.3752	NC	NC	NC	NC	NC	NC	NC		5/	NC	NC	.3542	NC
5/13/67		.7004	NC		5/	.3502	NC	.3838	NC	.1901	NC		5/	.3292	NC	.3542	NC	.3212	NC		5/
5/20/67		.7068	.88	.7740	.98	.3534	.55	.3870	.55	.1917	.30		5/	.3324	.53		5/	.3244	.53		5/
5/27/67		NC	.98		5/	NC	NC	NC	NC	NC	NC	.2075	.30	NC	NC	.3660	.53	NC	NC	.3660	.53
9/9/67		.7328	.99		5/	.3664	NC		5/	.1982	.31		5/	.3454	.54	.3792	.54	.3374	.54		5/
	10/25/67		.93		.93		NC		NC		NC		NC		NC		NC		NC		.54
	2/26/68		NC		NC		.57		.57		NC		.31		.55		.55		.39		.39
3/2/68		NC			5/	NC			5/	NC			NC	NC			5/	.30			5/
	3/4/68		NC		NC		NC		NC		NC		5/		NC		NC		.55		.55
3/9/68		NC			5/	NC			5/	NC			5/	NC			5/	.3374			5/
	5/3/68		.95		.95		NC		NC		NC		NC		NC		NC		NC		NC
5/4/68		.7524			5/	.3762			5/	.2031	.32		5/	.3552			5/	.3472			5/
	5/8/68		.96		.96		.58		.58		NC		.32		.56		.56		NC		NC
	7/2/68		.98		.98		.59		.59				NC		.58		.58		.57		.57
7/6/68		.7656			5/	.3828			5/	.2064			5/	.3618			5/	.3538			5/
	9/16/68		NC		NC		.58		.58		NC		NC		.57		.57		NC		NC

No price changes during period 9/17/68 through 12/31/68.

1/ Source: Borden Company Weekly Billings of A & P Store Summaries for Chicago and Suburbs Area.

2/ Source: A & P Price Books.

3/ A & P label milk purchases started 11/1/65.

4/ A & P billings for weeks ending 11/6/65, 11/13/65, and 11/27/65 not available.

5/ A & P store did not purchase this item at this time.

6/ Since Price Pool Data was not available for periods 1/2/65-2/6/66 and 11/16/66-10/24/67, retail prices shown on Borden Company Weekly Billings were used for these periods.

" denotes no change in price.

842a

SUMMARY PRESENT COST VS BORDEN & BOWMAN QUOTATIONS

COMMODITY	YEARLY USAGE UNITS	BORDEN LABEL COST	BOWMAN'S A&P LABEL QUOTATION	BORDEN'S A&P LABEL QUOTATION	COST SAVINGS BORDEN VS A&P QUOTATION FROM BORDEN
ALL PAPER					
Gals. Homo	1,260,342	$ 887,449	$ 789,235	$ 757,387	$ 130,062
½ Gals. Homo	7,044,909	2,541,638	2,204,357	2,148,909	392,729
Qts. Homo	2,543,688	511,749	441,936	438,438	73,311
Qts. Chocolate	226,443	53,802	47,068	47,702	6,100
½ Gals. Buttermilk	405,236	147,766	126,735	125,245	22,521
Qts. Buttermilk	683,401	133,796	101,417	100,922	32,874
½ Gals. 2%	1,[illegible]2,943	338,294	300,160	286,870	51,424
½ Gals. Skim	630,604	212,438	188,645	174,951	37,487
Qts. Skim	522,252	98,211	85,224	74,190	24,021
½ Pts. Whip Cream	372,302	111,401	95,937	96,832	14,569
Pts. Half & Half	1,798,400	569,903	488,397	471,870	98,033
		$5,606,447	$4,869,111	$4,723,316	$ 883,131

843a

BOWMAN DAIRY COMPANY

EXECUTIVE OFFICES: 201 NORTH WELLS STREET CHICAGO, ILLINOIS 60606 TELEPHONE 312: 645-6222

August 31, 1965

Mr. E. R. Schmidt, Buyer
The Great Atlantic & Pacific Tea Co., Inc.
Middle West Division
2622 North Pulaski Road
Chicago, Illinois 60639

COPY

Dear Mr. Schmidt:

Thank you for the opportunity to offer our price quotations according to your specifications. They are attached herewith for the following areas on fluid milk products only. (Cottage Cheese, separate.)

These quotations were developed by our accountants on an estimated total dollar volume of approximately one million dollars per month (26 delivery days) using Chicago list prices. A substantial increase or decrease in the size of your order (compared to the assumption of dollar volumes set forth above) would affect these prices and I would appreciate an opportunity to discuss with you a) the areas involved b) the dollar volume and c) the resultant prices.

AREA:

1. Metropolitan Chicago
2. Northwestern Illinois
3. North Central Illinois
4. Indiana
5. Iowa

Each bid on the above areas consists of the following substantiating materials:

1. Map Indicating Location of Stores
2. Cost Plus Pricing Schedule for the Bowman Label and the A & P Label Brands
3. Standard Direct Product Cost - Chicago Plant
4. Selling and Delivery Expenses - Per Route Day

FLORIDA: ST. PETERSBURG • IOWA: DAVENPORT • INDIANA: NEW ALBANY, TERRE HAUTE
• MICHIGAN: SAGINAW • OHIO: CLEVELAND, COLUMBUS • WISCONSIN: CHIPPEWA FALLS, MILWAUKEE, RACINE, JANESVILLE

C

Mr. E. R. Schmidt

August 31, 1965

These price quotations would only change as follows:

1. Increase or decrease in Federal Fluid Milk Market Order.
2. Increase or decrease in container costs.
3. Labor increases.

Costs not considered in these quotations are as follows:

1. Return of out-dated or sour merchandise.
2. Merchandising of stores and point-of-sale materials.
3. Call-backs (straight-line delivery service only was considered).

I am enclosing a history of the period of time that we serviced the A & P Company. This substantiates that we contributed to A & P's progress for the last eleven years that we had the privilege of servicing your stores.

We are looking forward to a resumption of business with your fine corporation in the very near future.

Sincerely,

Frank T Cannon Sr

FTC:rt
enc.

Frank T. Cannon, Sr.
General Manager - Wholesale

D

PRICE ESCALATION ON MILK ORDER PRICES

Chicago area prices are quoted on the basis of the present Order Number 30 price plus a super pool which totals $4.32 per CWT. for 3.5% Class I Milk Products.

Iowa area prices are quoted on the basis of Order Number 63 price plus a super pool which totals $4.37 per CWT. for 3.5% Class I Milk Products.

Each change of 5 cents per CWT. will increase or decrease quoted prices by 1/8 cent per point for each product.

In the event that stores are served in areas where there is no Federal Milk Order or where the super pool price is not effective, we will adjust quoted prices in that area.

LABOR PRICES

Quoted prices will be adjusted for any changes in Union labor rates or changes in Federal Payroll taxes.

Container Costs

Quoted prices will be adjusted for any changes in the purchase cost for containers used.

E

H 36 — 8/31/65

846a

EXHIBIT A

4

NET PRICES — METROPOLITAN CHICAGO - NORTHWESTERN AND NORTH CENTRAL ILLINOIS

STORE SERVICE SIX DAYS WEEKLY

	SCHEDULE I DIRECT COST FOB CHICAGO AREA PLANT	MARKUP	NET PRICE AT CHICAGO AREA PLANT	DIRECT VANNING COST TO SALES AREA	Direct Cost of delivery per point	COMMISSION	NET DELIVERED PRICE SIX DAY RT.
QTS. HOMO. V.D.	.1302	.0081	.1383	.0025	.0206	.0082	.1696
1/2 GAL. HOMO. V.D. (GLASS)							
1/2 GAL. HOMO. V.D. (FIBER)	.2390	.0119	.2509	.0051	.0412	.0164	.3136
GAL. HOMO. V.D. -GLASS	.4402	.0252	.4654	.0146	.0824	.0328	.5952
GAL. HOMO. V.D. - FIBER	.4878	.0141	.5019	.0101	.0824	.0328	.6272
QTS. BOW-CAL							
PTS. SOURED HALF & HALF	.2385	.0275	.2660	.0028	.0206	.0082	.2976
PTS. HALF & HALF	.2014	.0180	.2194	.0014	.0206	.0082	.2496
QTS. RICH CREAM							
PTS. RICH CREAM							
1/2 PT. RICH CREAM							
QTS. WHIP CREAM							
1/2 PT. WHIP CREAM	.2083	.0180	.2263	.0009	.0206	.0082	.2560
"QUICK-WHIP" DISPENSER	.2742	.0353	.3095	.0009	.0206	.0082	.3392
"REDDI WIP" DISPENSER	.4075	.0178	.4253	.0009	.0206	.0082	.4550
[illegible] - PTS.	.1445	.0109	.1554	.0014	.0206	.0082	.1856
PTS. SOUR CREAM	.3001	.0375	.3376	.0112	.0412	.0164	.4064
1/2 PTS. SOUR CREAM	.1486	.0250	.1736	.0056	.0206	.0082	.2080
1/2 GAL. BUTTERMILK	.2259	.0250	.2509	.0051	.0412	.0164	.3136
QTS. BUTTERMILK	.1003	.0156	.1159	.0025	.0206	.0082	.1472
QTS. DARI-RICH	.1617	.0150	.1767	.0025	.0206	.0082	.2080
1/2 PTS. DARI-RICH CARRY PACK							
1/2 PTS. CHOCOLATE SHAKE	.0591	.0095	.0686	.0009	.0052	.0021	.0768
1/2 GAL. STA-FIT	.2131	.0250	.2381	.0051	.0412	.0164	.3008
QT. STA-FIT	.1163	.0156	.1319	.0025	.0206	.0082	.1632
1/2 GAL. 2%	.2106	.0211	.2317	.0051	.0412	.0164	.2944
YOGURT (Plain & Strawberry)	.1425	.0006	.1431	.0009	.0206	.0082	.1728
SNACK DIP - 8 oz.	.2458	.0045	.2503	.0009	.0206	.0082	.2800

CLASS I PRICE - 4.32 per CWT.

" 36-8-31-65

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STANDARD DIRECT PRODUCT COSTS - CHICAGO PLANTS

	Raw Merchandise Cost FOB Chicago Plan	Bottling Plant Labor and Expense	Containers	Total Direct Costs FOB Chicago Plant
QTS. HOMO. V.D.	.0986	.0154	.0162	.1302
1/2 GAL. HOMO. V.D. (GLASS)				
1/2 GAL. HOMO. V.D. (FIBER)	.1971	.0129	.0290	.2390
GAL. HOMO. V.D. - GLASS	.3942	.0279	.0181	.4402
GAL HOMO V.D - FIBER	.3942	.0321	.0615	.4878
QTS. EGG-NOG				
PTS. SOURED HALF & HALF	.1202	.0690	.0493	.2385
PTS. HALF & HALF	.1201	.0698	.0115	.2014
QTS. RICH CREAM			-	
PTS. RICH CREAM			-	
1/2 PT. RICH CREAM			-	
QTS. WHIP CREAM			-	
1/2 PT. WHIP CREAM	.1489	.0505	.0089	.2083
"QUICK-WHIP" DISPENSER	.2717	.0025	-	.2742
"REDDI WIP" DISPENSER	.4050	.0025	-	.4075
BOSTON BLEND PINTS	.1420	.0025	-	.1445
PTS. SOUR CREAM	.1666	.0564	.0431	.2661
1/2 PTS. SOUR CREAM	.0833	.0305	.0348	.1486
1/2 GAL. BUTTERMILK	.1301	.0668	.0290	.2259
QTS. BUTTERMILK	.0751	.0170	.0162	.1083
QTS. DARI-RICH	.1043	.0512	.0162	.1717
1/2 PTS. DARI-RICH CARRY PACK				
1/2 PTS. CHOCOLATE SHAKE	.0403	.0089	.0099	.0591
1/2 GAL. STA-FIT	.1312	.0529	.0290	.2131
QT. STA-FIT	.0656	.0345	.0162	.1163
1/2 GAL. 2%	.1672	.0414	.0290	.2376
YOGURT (Plain & Strawberry)	.1400	.0025	-	.1425
SNACK DIP - 8 OZ	.2433	.0025	-	.2452

CLASS I PRICE - 4.32 per CWT.

THE BORDEN COMPANY
CHICAGO METROPOLITAN REGION
1821 S. KILBOURN AVENUE
CHICAGO, ILLINOIS 60623

AREA CODE 312 CRAWFORD 7-6400

October 1, 1965

Mr. E. R. Schmidt
The Great A & P Tea Company
2622 N. Pulaski Avenue
Chicago, Illinois

Dear Mr. Schmidt:

You have our price quotations dated September 21, 1965 for milk, cream and other dairy products for several areas in Indiana and Illinois. We wish to assure you that our prices are proper under applicable law and we are prepared to defend these prices.

We appreciate your patronage.

Sincerely,

THE BORDEN COMPANY
Chicago Metropolitan Region

J. G. Tarr, Sales Manager
Chain Store Sales

H

THE BORDEN COMPANY
CENTRAL DIVISION
ZONE NO. I - CHICAGO AND CALUMET AREA

PRICES AS OF MAY 8, 1965

(4)

COMMODITY	YEARLY USAGE	BORDEN LABEL UNIT COST	BORDEN LABEL ANNUAL COST	A & P LABEL UNIT COST	A & P LABEL ANNUAL COST	DIFFERENTIAL ANNUAL BASIS
Gals. Homo Paper	773,327	$.7371	$ 570,024	$.6220	$ 481,009	$ 89,015
½ Gals. Homo	5,321,403	.3685	1,960,937	.3110	1,654,956	305,981
Qts. Homo	2,194,591	.2000	438,915	.1705	374,178	64,737
Qts. Chocolate	163,037	.2437	39,728	.2150	35,053	4,675
½ Gals. Buttermilk	331,344	.3685	122,096	.3030	100,397	21,699
Qts. Buttermilk	542,083	.2000	108,420	.1560	84,565	23,855
½ Gals. 2%	612,231	.3453	211,397	.2900	177,547	33,850
½ Gals. Skim	515,996	.3453	178,169	.2820	145,511	32,658
Qts. Skim	445,587	.1917	85,419	.1440	64,165	21,254
½ Pts. Whip Cream	256,481	.3068	78,693	.2640	67,711	10,982
Pts. Half-Half	1,577,403	.2984	470,704	.2440	384,886	85,818
TOTAL			$4,264,502		$3,569,978	$694,524

THE BORDEN COMPANY
CENTRAL DIVISION
ZONE NO. II - SOUTH BEND AREA

PRICES AS OF MAY 8, 1965

COMMODITY	YEARLY USAGE	BORDEN LABEL UNIT COST (ave.)	BORDEN LABEL ANNUAL COST		A & P LABEL UNIT COST	A & P LABEL ANNUAL COST	DIFFERENTIAL ANNUAL BASIS
Gals. Homo	129,272	$.6305	$ 81,501	3-Day	$.5848	$ 75,709	$ 5,792
				6-Day	.6248		
½ Gals. Homo	493,064	.3203	157,907	3-Day	.2924	144,575	13,332
				6-Day	.3124		
Qts. Homo	97,431	.1694	16,501	3-Day	.1612	15,748	753
				6-Day	.1712		
Qts. Chocolate	10,400	.2166	2,253	3-Day	.2057	2,142	111
				6-Day	.2157		
½ Gals. Buttermilk	23,504	.3193	7,505	3-Day	.2844	6,695	810
				6-Day	.3044		
Qts. Buttermilk	29,276	.1687	4,940	3-Day	.1467	4,303	637
				6-Day	.1567		
½ Gals. 2%	101,781	.2965	30,177	3-Day	.2714	27,705	2,472
				6-Day	.2914		
½ Gals. Skim	21,216	.2852	6,050	3-Day	.2634	5,593	457
				6-Day	.2834		
Qts. Skim	11,371	.1601	1,820	3-Day	.1347	1,536	284
				6-Day	.1447		
½ Pts. Whip Cream	14,109	.2555	3,605	3-Day	.2547	3,602	3
				6-Day	.2647		
Pts. Half-Half	76,076	.2465	18,755	3-Day	.2337	17,822	933
				6-Day	.2447		
TOTAL			$331,014			$305,430	$ 25,584

THE BORDEN COMPANY

Central Division

Prices as of May 8

Zone No.III - Rockford-Joliet Area.

Commodity	Yearly Usage	Borden Label Unit Coast Average	Borden Label Annual Cost	A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	50,353	$.7305	$36,781	$.5972	$30,071	$ 6,710
1/2 Gals. Homo	251,507	.3645	91,676	.2986	75,100	16,576
Quarts Homo	63,076	.1907	12,029	.1643	10,363	1,666
Quarts Chocolate	13,919	.2403	3,345	.2088	2,906	439
1/2 Gals.Butter-milk	20,124	.3643	7,332	.2906	5,848	1,484
Quarts Buttermilk	30,957	.1893	5,859	.1498	4,637	1,222
1/2 Gals. 2%	97,725	.3347	32,708	.2776	27,128	5,580
1/2 Gals. Skim	25,116	.3306	8,303	.2696	6,771	1,532
Quarts Skim	15,600	.1789	2,791	.1378	2,150	641
1/2 Pts.Whipping Cream	29,588	.2882	8,528	.2578	7,628	900
Pints Half-Half	58,725	.2807	16,484	.2378	13,964	2,520
Total			$225,836		$186,566	$39,270

THE BORDEN COMPANY
Central Division

Prices as of May 8

ZONE NO. IV -- Miscellaneous Area

Commodity	Yearly Usage	Borden Label Unit Cost (Average)	Borden Label Annual Cost	A & P Label Unit Cost (Average)	A & P Label Annual Cost	Differential Annual Basis
Gallons Homo	158,479	$ .6866	$ 108,819	$ .5627	$ 89,173	$ 19,646
1/2 Gals. Homo	723,095	.3501	253,188	.2825	204,331	48,857
Quarts Homo	141,908	.1837	26,069	.1548	21,970	4,099
Quarts Chocolate	23,487	.2325	5,460	.1992	4,678	782
1/2 Gals. Buttermilk	30,264	.3580	10,833	.2769	8,379	2,454
Quarts Buttermilk	52,468	.1843	9,672	.1414	7,417	2,255
1/2 Gals. 2%	124,193	.3232	40,144	.2619	32,528	7,616
1/2 Gals. Skim	30,663	.3273	10,036	.2571	7,883	2,153
Quarts Skim	27,109	.1707	4,628	.1295	3,511	1,117
1/2 Pints Whip Cream	48,967	.2917	14,283	.2494	12,212	2,071
Pints Half & Half	156,381	.2742	42,883	.2288	35,782	7,101
			$ 526,015		$ 427,864	$ 98,151

Prices as of May 8 E

THE BORDEN COMPANY
Central Division

Zone No. V---Rock Island Area.

Commodity	Yearly Usage	Borden Label Unit Cost Average	Borden Label Annual Cost	A & P Label Unit Cost	A & P Label Annual Cost	Differential Annual Basis
Gals. Homo	148,911	$.6066	$90,324	$.5468	$81,425	$ 8,899
1/2 Gals. Homo	255,840	.3035	77,636	.2734	69,947	7,689
Quarts Homo	106,652	.1710	18,235	.1517	16,179	2,056
Quarts Chocolate	15,600	.1933	3,016	.1874	2,923	93
Quarts Buttermilk	28,617	.1714	4,905	.1372	3,926	979
1/2 Gals. 2%	87,013	.2743	23,868	.2524	21,962	1,906
1/2 Gals. Skim	37,613	.2627	9,880	.2444	9,193	687
Quarts Skim	22,585	.1573	3,553	.1252	2,828	725
1/2 Pts. Whipping Cream	23,157	.2717	6,292	.2452	5,679	613
Pints Half-Half	86,216	.2445	21,077	.2252	19,416	1,661
Total			$258,786		$233,478	$25,308

THE BORDEN COMPANY

CHICAGO - CALUMET AREA (ZONE NO. I)

GENERAL QUOTATION - A & P PRIVATE LABEL

(Related to the Present Announced Superpool Class I Price of $4.29)

	Net for Borden Label	* Net for A & P Private Label
Homo V. D. Milk - Gal. Paper	$ .7371	$ .6220
Homo V. D. Milk - 1/2 Gal. Paper	.3685	.3110
Homo V. D. Milk - Qts. Paper	.2000	.1705
2% - Gal. Paper	.6906	.5800
2% - 1/2 Gal. Paper	.3453	.2900
Vitamin Fortified Skim - 1/2 Gal. Paper	.3453	.2820
Vitamin Fortified Skim - Qts. Paper	.1917	.1400
Half & Half - Pts. Paper	.2984	.2440
Chocolate Milk - Qts. Paper	.2437	.2150
Buttermilk - 1/2 Gal. Paper	.3685	.3030
Buttermilk - Qts. Paper	.2000	.1560
Whipping Cream - 1/2 Pts. Paper	.3068	.2640

* (1) Above net unit prices for A & P private label products are related to delivery conditions and cooperative program as set forth on the accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of $4.29 per cwt. indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit pricesfor A & P private label products are subject to change in connection with changes that occur in the cost of labor and containers.

N

Schedule No. 1 - Part 2
(Zone No. 2)
September 21, 1965

THE BORDEN COMPANY

General Quotation -- A & P Private Label

(Related to Present Announced Superpool Class I Price of $4.32 Per Cwt.)

Private Label Products	* Net Price for A & P Private Label Products by Type and Method of Delivery			
	3-Day Per Week Drop Delivery	4-Day Per Week Drop Delivery	5-Day Per Week Drop Delivery	6-Day Per Week Drop Delivery
Homo V.D. Milk - Gallon Paper	.5848	.6048	.6148	.6248
Homo V.D. Milk - 1/2 Gal. Paper	.2924	.3024	.3074	.3124
Homo V.D. Milk - Quart Paper	.1612	.1662	.1687	.1712
2% - 1/2 Gal. Paper	.2714	.2814	.2864	.2914
Vitamin Fortified Skim - 1/2 Gal. Paper	.2634	.2734	.2784	.2834
Vitamin Fortified Skim - Quart Paper	.1347	.1397	.1422	.1447
Half & Half - Pint Paper	.2337	.2397	.2422	.2447
Chocolate Milk - Quart Paper	.2057	.2107	.2132	.2157
Buttermilk - 1/2 Gal. Paper	.2844	.2944	.2994	.3044
Buttermilk - Quart Paper	.1467	.1517	.1542	.1567
Whipping Cream - 1/2 Pint Paper	.2547	.2597	.2622	.2647

Prices apply to stores located in the geographical area subject to the terms of the Chicago Superpool which are as follows:

Stores Receiving 3-Day Per Week Delivery:

South Bend (6 stores), Mishawaka
Elkhart, Goshen, La Porte, Valparaiso,
Walkerton and Michigan City.

Stores Receiving 6-Day Per Week Delivery:

Chesterton, South Bend (1 store).

Stores Receiving 4-Day and 5-Day Per Week Delivery:

None

* (1) Above net unit prices for A & P private label products are related to delivery conditions and co-operative program as set forth on the accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of $4.32 per cwt., indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit prices for A & P private label products are subject to change in connection with changes that occur in the cost of labor and containers.

Schedule No. 2 - Part 2
(Zone No. 3)
September 21, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to Present Announced Superpool Class I Price of $4.00 per Cwt.)

* Net Price for A & P Private Label Products by Type and Method of Delivery

Private Label Products	3 - Day Per Week Drop Delivery	4 - Day Per Week Drop Delivery	5 - Day Per Week Drop Delivery	6 - Day Per Week Drop Delivery
Homo V.D. Milk - Gal. Paper	.5572	.5772	.5872	.5972
Homo V.D. Milk - 1/2 Gal. Paper	.2786	.2886	.2936	.2986
Homo V.D. Milk - Quart Paper	.1543	.1593	.1618	.1643
2% - 1/2 Gal. Paper	.2576	.2676	.2726	.2776
Vitamin Fortified Skim - 1/2 Gal. Paper	.2496	.2596	.2646	.2696
Vitamin Fortified Skim - Quart Paper	.1278	.1328	.1353	.1378
Half & Half - Pint Paper	.2278	.2328	.2353	.2378
Chocolate Milk - Quart Paper	.1988	.2038	.2063	.2088
Buttermilk - 1/2 Gal. Paper	.2706	.2806	.2856	.2906
Buttermilk - Quart Paper	.1398	.1448	.1473	.1498
Whipping Cream - 1/2 Pint Paper	.2478	.2528	.2553	.2578

Prices apply to stores located in the geographical area subject to the terms of the Rockford Superpool which are as follows:

Stores Receiving 6-Day Per Week Delivery:

Lockport, Aurora (2 stores), Joliet (6 stores), Rockford (5 stores), Freeport and Loves Park.

Stores Receiving 3-Day - 4-Day - or 5-Day Per Week Delivery:

None

* (1) Above net unit prices for A & P private label products are related to delivery conditions and co-operative program as set forth on the accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of $4.00 per cwt. indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit prices for A & P private label products are subject to change in connection with changes that occur in the cost of labor and containers.

Schedule No. 3 - Part 2
(Zone No. 4)
September 21, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to the Announced Class I Price Under Federal Order No. 30 of $3.78 per Cwt.)

Private Label Products	* Net Price for A & P Private Label Products by Type and Method of Delivery			
	3-Day Per Week Drop Delivery	4-Day Per Week Drop Delivery	5-Day Per Week Drop Delivery	6-Day Per Week Drop Delivery
Homo V.D. Milk - Gal. Paper	.5380	.5580	.5680	.5780
Homo V.D. Milk - 1/2 Gal. Paper	.2690	.2790	.2840	.2890
Homo V.D. Milk - Quart Paper	.1495	.1545	.1570	.1595
2% - 1/2 Gal. Paper	.2480	.2580	.2630	.2680
Vitamin Fortified Skim Milk - 1/2 Gal. Paper	.2400	.2500	.2550	.2600
Vitamin Fortified Skim Milk - Quart Paper	.1230	.1280	.1305	.1330
Half & Half - Pint Paper	.2230	.2280	.2305	.2330
Chocolate Milk - Quart Paper	.1940	.1990	.2015	.2040
Buttermilk - 1/2 Gal. Paper	.2610	.2710	.2760	.2810
Buttermilk - Quart Paper	.1350	.1400	.1425	.1450
Whipping Cream - 1/2 Pint Paper	.2430	.2480	.2505	.2530

Prices apply to stores located in the geographical area subject to the announced Class I milk prices under Federal Order No. 30, (which Class I milk prices are not subject to producer "superpool" payments) which stores are as follows:

Stores Receiving 3-Day Per Week Delivery:

Manteno	Momence	St. Annes	Gilman	La Salle
Marseilles	Ottawa	Streator	Pontiac	Princeton
Spring Valley	Sandwich	Plano	Lacon	Minonk
Culver	Knox	North Judson	Galena	Warren
Mendota				

Stores Receiving 4-Day Per Week Delivery:

None

Stores Receiving 5-Day Per Week Delivery

Belvidere	Marengo	DeKalb
Rochelle	Polo	Mt. Morris
Dixon		

Stores Receiving 6-Day Per Week Delivery:

Woodstock	McHenry
Fox Lake	Antioch
Kankakee (2 stores)	Wauconda
Pecatonica	Crystal Lake
Wilmington	Zion

* (1) Above net unit prices for A & P private label products are related to delivery conditions and co-operative program as set forth on the accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of $3.78 per cwt. indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit prices for A & P private label products are subject to change in connection with changes that occur in the cost of labor and containers.

R

Schedule 4 - Part 2
(Zone No. 5)
September 21, 1965

THE BORDEN COMPANY

GENERAL QUOTATION - A & P PRIVATE LABEL

(Related to the Announced Class I Price Under Federal Order #63) of * 3.88 per Cwt.

* Net Price for A & P Private Label Products by Type and Method of Delivery

Private Label Products	3-Day Per Week Drop Delivery	4-Day Per Week Drop Delivery	5-Day Per Week Drop Delivery	6-Day Per Week Drop Delivery
Homo V.D. Milk Gal. Paper	.5468	.5668	.5768	.5868
Homo V.D. Milk 1/2 Gal. Paper	.2734	.2804	.2884	.2934
Homo V.D. Milk Quart Paper	.1517	.1567	.1592	.1617
2% - 1/2 Gal. Paper	.2524	.2624	.2674	.2724
Vit. Fort. Skim Milk 1/2 Gal. Paper	.2444	.2544	.2594	.2644
Vit. Fort. Skim Milk Quart Paper	.1252	.1302	.1327	.1352
Half & Half Pint Paper	.2252	.2302	.2327	.2352
Chocolate Milk Quart Paper	.1874	.1924	.1949	.1974
Buttermilk Quart Paper	.1372	.1422	.1447	.1472
Whipping Cream 1/2 Pint Paper	.2452	.2502	.2527	.2552

Prices apply to stores in the geographical area subject to the announced Class I Milk prices under Federal Order No. 63, (which Class I Milk prices are not subject to producer "Super Pool" payments) which stores are as follows:

Stores Receiving 3 Day Per Week Delivery

Geneseo Kewanee Lanark Moline (2 Stores)
Mt. Carroll Rock Island Savannah Sterling
Toulon Galesburg (2 Stores) Clinton Davenport (2 Stores)

Stores Receiving 4 Day, 5 Day or 6 Day Delivery

None.

* (1) Above net unit prices for A & P private label products are related to delivery conditions and co-operative program as set forth on the accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of $3.88 per cwt. indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit prices for private label products are subject to change in connection with changes that occur in the cost of labor and containers.

S

Schedule #1

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price - 3.5% B.F.	$ 4.2900
Market Administrator's Fee	.0200
Shrinkage 1%	.0045
Procurement, Bulk Tank Premiums Association Fees, Inner Zone Premiums, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$ 4.5645
To 3.4% B.F. Finished Product	.0740
Cost of 3.4% Finished Product	$ 4.4905

MILK COST BY ITEMS

Quart	2.15 pounds x $4.4905 per cwt.	=	$ .0966
Half Gallon	4.30 pounds x $4.4905 per cwt.	=	.1931
Gallon	8.60 pounds x $4.4905 per cwt.	=	.3862

Schedule No. 1 - Part 1
(Zone No. 2)

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$4.3200
Market Administrator's Fee	.0200
Shrinkage	.0045
Procurement, Bulk Tank Premiums, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.5945
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$4.5245

MILK COST BY ITEMS

Quarts 2.15 pounds X $4.5245 per cwt.	=	$.0973
Half Gallons 4.30 pounds X 4.5245 per cwt.	=	.1946
Gallons 8.60 pounds X 4.5245 per cwt.	=	.3891

Schedule No. 2 - Part 1
(Zone No. 3)

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$4.0000
Market Administrator's Fee	.0200
Shrinkage	.0043
Procurement, Bulk Tank Premium, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.2743
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$4.2043

MILK COSTS BY ITEMS

Quarts	2.15 pounds X $4.2043 per cwt.	= $.0904
Half Gallons	4.30 pounds X 4.2043 per cwt.	= .1808
Gallons	8.60 pounds X 4.2043 per cwt.	= .3616

Schedule No. 3 - Part 1.
(Zone No. 4)

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$3.7800
Market Administrator's Fee	.0200
Shrinkage	.0041
Procurement, Bulk Tank Premiums, Association Fees, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$4.0541
To 3.4% B.F. Finished Product	.0700
Cost of 3.4% Finished Product	$3.9841

MILK COSTS BY ITEMS

Quarts 2.15 pounds x $3.9841 per cwt.	=	$ .0857
Half Gallons 4.30 pounds x 3.9841 per cwt.	=	.1713
Gallons 8.60 pounds x 3.9841 per cwt.	=	.3426

Schedule No. 4 - Part 1
(Zone No. 5)

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price 3.5% B.F.	$ 3.8800
Market Administrator's Fee	.0200
Milk Foundation and City Health Inspection Fee	.0200
Waste	.0040
Premiums	.1000
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$ 4.0240
To 3.4% B.F. Finished Product	.0720
Cost of 3.4% Finished Product	$ 3.9520

MILK COSTS BY ITEMS

Quarts 2.15 pounds X $3.9520	=	$ .0850
Half Gallons 4.30 pounds x 3.9520	=	.1699
Gallons 8.60 pounds X3.9520	=	.3398

THE BORDEN COMPANY
Central Division

Price Change Per Unit Schedule

Increase or Decrease per CWT. in Class I Price	Resulting Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

THE BORDEN COMPANY
Central Division

Price Change Per Unit Schedule

Increase or Decrease per CWT. in Class I Price	Resulting Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.33	.0072	.0144	.0288
.34	.0074	.0148	.0296
.35	.0076	.0152	.0304
.36	.0078	.0156	.0312
.37	.0080	.0160	.0320
.38	.0082	.0164	.0328
.39	.0085	.0170	.0340
.40	.0087	.0174	.0348
.41	.0089	.0178	.0356
.42	.0091	.0182	.0364
.43	.0093	.0186	.0372
.44	.0095	.0190	.0380
.45	.0098	.0196	.0392
.46	.0100	.0200	.0400

867a

The Borden Company - Central Division

A & P Private Label Program

The new A & P Private Label milk program is based upon the following mutual understandings and the essentials of this new program are outlined below:

1. Borden personnel will assist in the formulation of this new program.

2. Borden personnel will also assist A & P personnel during the introductory period in the various phases of ordering and rotating of merchandise so that the program will achieve its ultimate sales goals and expectations. (Suggested Bulletins to Supervisors and Store Managers attached.)

3. A complete line of dairy products, as supplied by The Borden Company, should be featured in your dairy case.

4. Deliveries will be on a limited service basis as follows:

   (a) Stores served on a three-day per week basis will receive one delivery on Monday-Wednesday-Friday or Tuesday-Thursday-Saturday.

   (b) Stores served on a five-or six-day per week basis will receive one delivery per day.

   (c) The delivery time to each store will be handled in a manner to effectuate the most efficient delivery schedule.

   (d) Special deliveries shall not be made except in unusual instances, such as Borden's failure to perform on the advance order.

5. Deliveries at the store level shall be handled in the following manner:

   (a) To the receiving door of the store.
   (b) To a designated place on the receiving platform.
   (c) To a refrigerated storage box that can be entered directly from a platform or ground level location and into which dairy products can be conveniently stocked.
   (d) If dairy products are delivered to a refrigerated storage box, adequate storage space shall be provided so that proper rotation of carry-over merchandise can be handled by store personnel.
   (e) Empty milk cases and bottles shall be placed at a designated point for easy accessibility and pickup.

2

6. Ordering of Products.

   (a) Advance order delivery tickets shall be supplied by The Borden Company.

   (b) Advance order tickets for the following delivery shall be completed for presentation to the Borden driver at time of delivery.

7. Code Dates.

   (a) Products are clearly coded on the gable of the milk items and on the bottom of all bucket products.

   (b) All products are coded with an expiration date.

   (c) Code date expirations shall be explained in the Chicago Unit Office and at local levels.

8. Credit for Product Returns.

   (a) Credit for product returns shall be only on the basis of faulty containers or product remaining within code date.

9. Borden's will not be obligated to furnish any merchandising materials, price promotions, demonstrators, or special displays on A & P labelled products under this program.

10. Borden salesmen's services will be supplied at the store level only, to follow through on a complaint covering such matters as service, product, or container.

Suggestion for

BULLETIN NO. I

ATTENTION STORE NO. _____

TO: SUPERVISORS AND STORE MANAGERS

Your store will be serviced with A & P labeled milk products by The Borden Company on a drop shipment delivery basis.

The essentials of this new purchasing arrangement are as follows:

1. Limited deliveries.
2. No returns.
3. No service in regard to rotation, stocking, etc.
4. Pre-order of merchandise.

We will advise you shortly of the requirements of ordering and handling of milk products under this new program and of our arrangements with Borden's.

The Borden Company will soon hold a series of meetings to explain to you the coordination of deliveries and to evaluate your physical set-up. The new pre-order system and control guide will help you obtain a pattern in regard to your requirements. These things must be covered in order that you may sensibly pre-order merchandise from the above supplier for your store's needs.

Please give these people your utmost cooperation. We recommend that you fully explain these procedures to your Assistant Manager, Dairy Department Head, or someone responsible for the operation and the ordering of dairy products. The new aspects of this system should be thoroughly understood and followed by members of your organization.

We will advise you shortly in regard to items and procedures and other details.

870a Suggestion for

BULLETIN NO. II

ATTENTION STORE NO. _____

TO: SUPERVISORS AND STORE MANAGERS

The new A & P private label milk delivery program has now been worked out, and deliveries to your stores will start on Monday _____. With this new program, we will be getting maximum benefits from the fast moving dairy items and it will be to our advantage for you to work with your supplier to handle this properly in order that we may all be successful in this venture.

Deliveries will be made on a limited service basis as follows:

(a) Stores served on a three day per week basis will receive one delivery on Monday-Wednesday-Friday or Tuesday-Thursday-Saturday.

(b) Stores served on a five or six day per week basis will receive one delivery per day.

(c) Special deliveries shall not be made except the failure of Borden's to perform on the advance order.

Deliveries at the store level shall be handled in the following manner:

(a) To the receiving door of the store.

(b) To a designated place on the receiving platform.

(c) To a refrigerated storage box that can be entered directly from a platform or ground level location and into which dairy products can be conveniently stocked.

(d) If dairy products are delivered to a refrigerated storage box, adequate storage space shall be provided so that proper rotation of carry-over merchandise can be handled by store personnel.

(e) Empty milk cases and bottles shall be placed at a designated point for easy accessibility and pick-up.

Ordering of Products

(a) Pre-order forms will be furnished to you by The Borden Company.

(b) This order must be completed and be available in the cooler at the time of the delivery for the driver to pick up.

Example: On three day delivery -- Monday delivery, pick up order for Wednesday. Wednesday delivery, pick up order for Friday. Friday delivery, pick up order for Monday, etc.

On the five or six day delivery schedule, the order again must be completed and available in the cooler for the following day's delivery.

Please follow instructions in order that we may have no inconvenience or unnecessary expense by orders not being available as outlined above.

In all cases, order changes will not be accepted since they can be adjusted on the following day's order.

We recommend you try, whenever possible, to order merchandise in even cases. This may not be possible in smaller volume stores.

As always in the use of your order form, you must take into consideration your meat feature, the week-end pay days, 15th and 1st of the month, holidays, individual store promotions on dairy features, and consult your past order forms and inventories.

All products are under a "no return" basis and the only exception will be for manufacturing defects. Please use care.

Codes

(a) Products are clearly coded on the gable of the milk items and on the bottom of all bucket products.

(b) All products are coded with an expiration date.

(c) Code date expiration shall be explained to you at future meetings.

(d) Please check code dates daily and rotate. There will be no services offered in regard to rotation and checking by the supplier. Do not make the customer unhappy by having old products in the case due to lack of attention to this operation.

For those stores who are presently on a three day drop delivery method, this should be nothing new for you. It might be well, however, to again review all of the procedures in the ordering and handling of dairy products.

We sincerely believe that this new milk program is another stride forward for our company and you will be able to achieve your ultimate sales goals and expectations.

2.

AREA MAP A

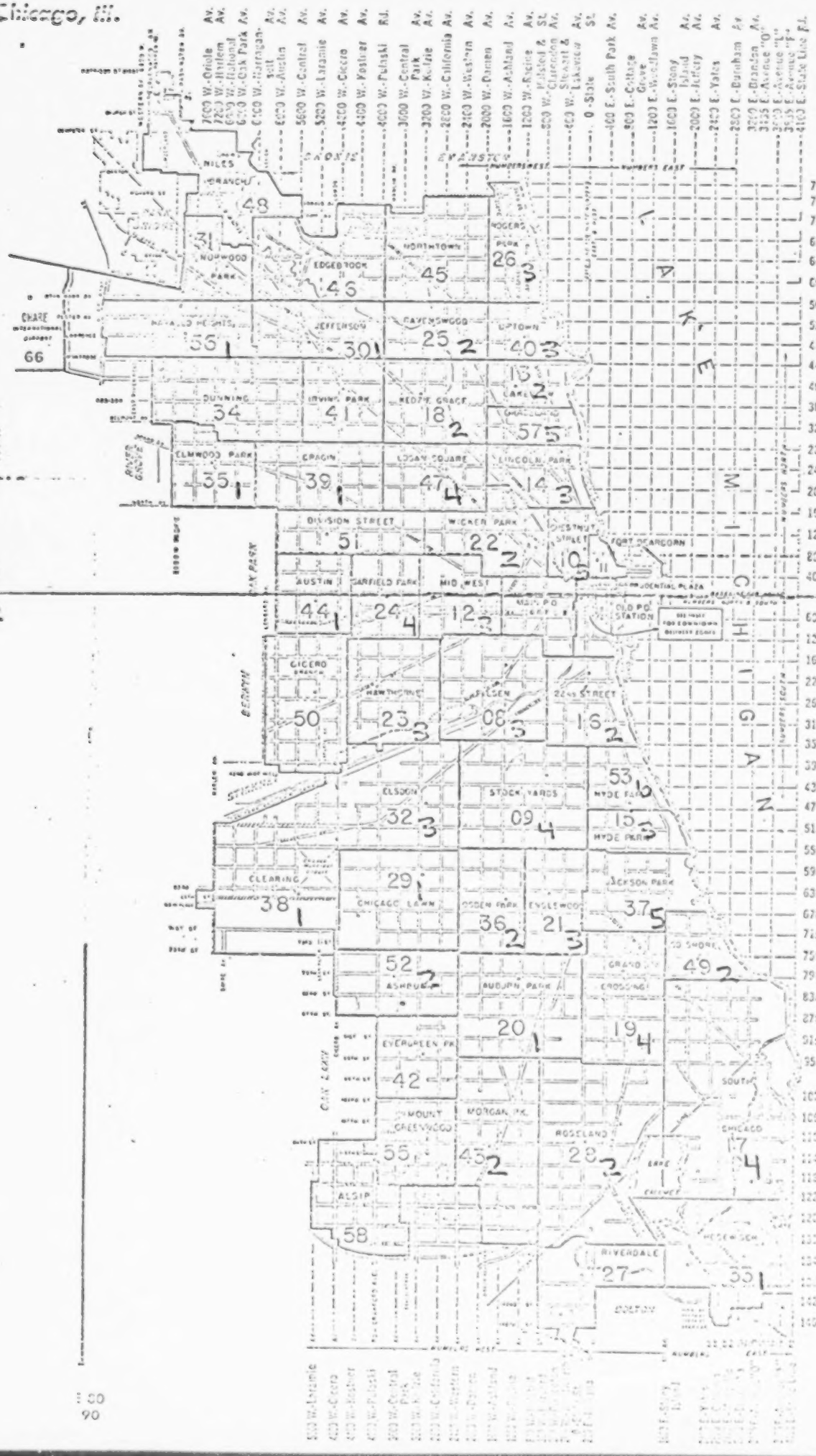
METROPOLITAN CHICAGO AREA

SECTION	STORES
Far North	8
Near North	17
Northwest	9
Far West	12
Near West	14
Joliet	7
South	12
Chicago	96
Total	175



Chicago, Ill.

4327



STORES IN METROPOLITAN CHICAGO AREA

FAR NORTH REGION	
ANTIOCH	1
FOX LAKE	1
LIBERTYVILLE	1
MUNDELEIN	1
WAUKEGAN	3
ZION	1
TOTAL	8

NEAR NORTH REGION	
DES PLAINES	1
EVANSTON	4
GLENVIEW	1
HIGHLAND PARK	1
HIGHWOOD	1
LAKE BLUFF	1
LAKE FOREST	1
NILES	1
NORTHBROOK	1
PARK RIDGE	1
SKOKIE	2
WILMETTE	1
WINNETKA	1
TOTAL	17

NORTHWEST REGION	
ARLINGTON HTS.	2
BARRINGTON	1
DUNDEE	1
ELGIN	1
MT. PROSPECT	1
PALATINE	1
SCHUMBURG	1
WAUCONDA	1
TOTAL	9

NEAR WEST REGION	
BERWYN	2
BROOKFIELD	1
CICERO	3
FRANKLIN PARK	1
LA GRANGE	1
MAYWOOD	1
NORRIDGE	1
OAK PARK	3
WESTERN SPRINGS	1
TOTAL	14

FAR WEST REGION	
AURORA	2
BATAVIA	1
BENSENVILLE	1
DOWNERS GROVE	1
ELMHURST	1
GLEN ELLYN	1
LOMBARD	1
NAPERVILLE	1
ST. CHARLES	1
VILLA PARK	1
WHEATON	1
TOTAL	12

JOLIET REGION	
JOLIET	6
LOCKPORT	1
TOTAL	7

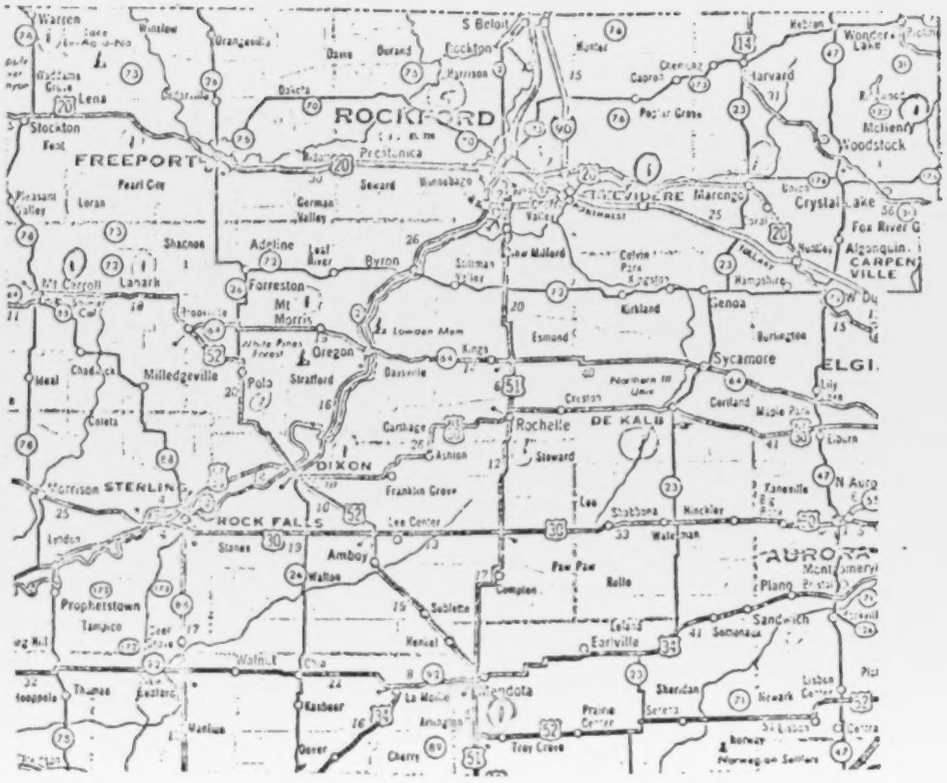
SOUTH REGION	
BLUE ISLAND	1
CHICAGO HTS.	2
CHICAGO RIDGE	1
DOLTON	1
EVERGREEN PARK	1
HARVEY	1
HOMEWOOD	1
MIDLOTHIAN	1
OAK LAWN	1
RICHTON PARK	1
SUMMIT	1
TOTAL	12

CITY OF CHICAGO REGION	
TOTAL	96

2

STORES IN NORTHWESTERN ILLINOIS

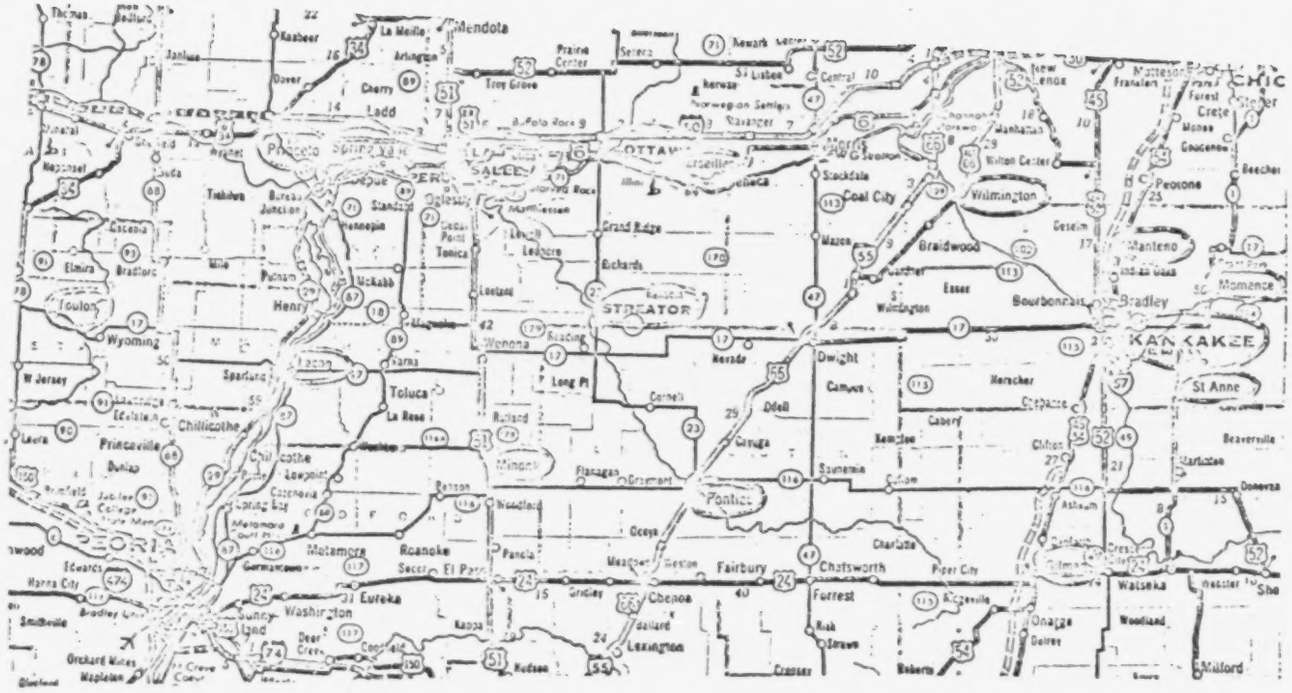
Crystal Lake	1
Warren	1
Freeport	1
Pecatonica	1
Rockford	5
Loves Park	1
Belvidere	1
Marengo	1
Woodstock	1
McHenry	1
Mt. Carroll	1
Lanark	1
Mt. Morris	1
Polo	1
Sterling	1
Dixon	1
Rochelle	1
DeKalb	1
Mendota	1
Sandwich	1
Total	24



AREA MAP D

NORTH CENTRAL ILLINOIS

Gilman	1
Kankakee	2
Manteno	1
LaSalle	1
Ottawa	1
Pontiac	1
Streator	1
Momence	1
Wilmington	1
Marseilles	1
Minonk	1
St. Anne	1
Toulon	1
Lacon	1
Spring Valley	1
Princeton	1
	17



:36 — 3/31/65

877a

EXHIBIT B

NET PRICES-INDIANA AREA

STORE SERVICE THREE DAYS WEEKLY

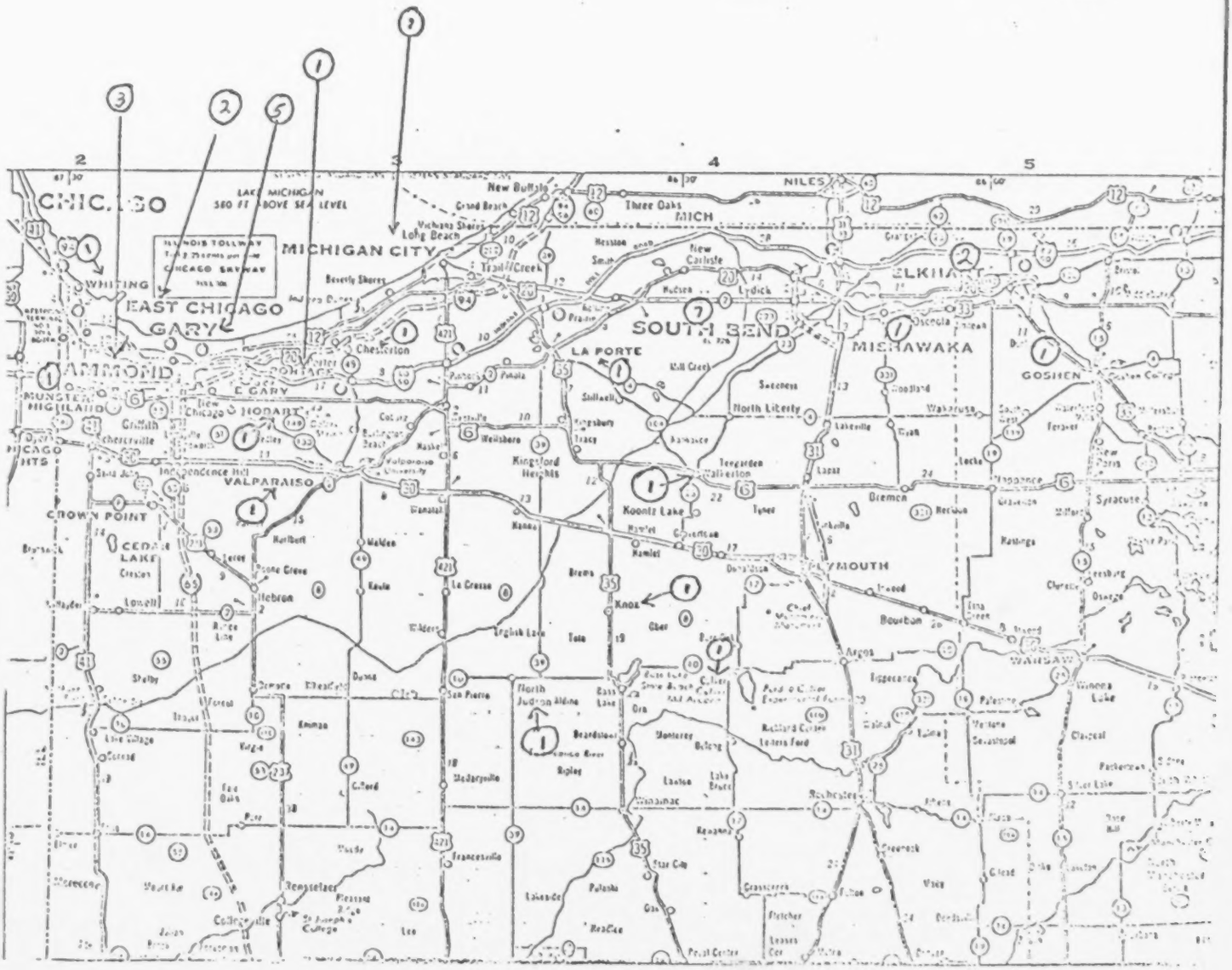
	SCHEDULE 1 DIRECT COST F.O.B. CHICAGO AREA PLANT	MARKUP	NET PRICE AT CHICAGO AREA PLANT	DIRECT VANNING COST TO SALES AREA	Direct Cost of delivery per point	Commission	NET DELIVERED PRICE-THREE DAYS WEEKLY
HO. D. V.D.	.1302	.0081	[illegible]	.0055	.0134	.0652	.1624
GAL. HOMO. V.D. (GLASS)							
GAL. HOMO. V.D. (FIBER)	.2291	.0119	.2509	.0112	.0268	.0134	.2993
HOMO. V.D.- GLASS	.4403	.0253	.4654	.0331	.0536	.0205	.5719
HOMO. V.D.- FIBER	.1838	.0141	.5019	.0321	.0536	.0204	.5760
SOUR-CAL							
SOURED HALF & HALF	.2335	.0325	.2660	.0061	.0134	.0052	.2907
HALF & HALF	.2014	.0150	.2164	.0061	.0134	.0052	.2411
RICH CREAM							
RICH CREAM							
PT. RICH CREAM							
WHIP CREAM							
PT. WHIP CREAM							
"WHIP" DISPENSER	.2083	.0180	.2263	.0020	.0134	.0052	.3221
"WHIP" DISPENSER	.2743	.0353	.3095	.0020	.0134	.0052	.3301
[illegible] - PTS	.4025	.0178	.4253	.0020	.0134	.0052	.4459
SOUR CREAM	.1445	.0109	.1554	.0031	.0134	.0052	.1771
PTS. SOUR CREAM	.3001	.0335	.3376	.0183	.0268	.0104	.3931
CAL. BUTTERMILK	.1486	.0250	.1736	.0117	.0134	.0052	.2039
BUTTERMILK	.2259	.0250	.2509	.0112	.0261	.0104	.2983
DAIR-RICH	.1003	.0116	.1159	.0055	.0134	.0052	.1400
PTS. DAIR-RICH CARRY PACK	.1617	.0150	.1767	.0055	.0134	.0052	.2004
PTS. CHOCOLATE SHAKE	.0591	.0095	.0686	.0020	.0034	.0013	.0753
GAL. SEA-FIT	.3131	.0250	.3381	.0112	.0268	.0104	.2865
SEA-FIT	.1153	.0166	.1319	.0055	.0134	.0052	.1560
GAL. 2%	.2106	.0211	.2317	.0112	.0268	.0104	.2801
SHAKE (Plain & Strawberry)	.1425	.0206	.1631	.0020	.0134	.0052	.1637
[illegible] - 8 OZ.	.2458	.0245	.2503	.0020	.0134	.0052	.2709

CLASS I PRICE. — 4.32 per CWT.

AREA MAP B

INDIANA STORES

WEST		EAST	
Whiting	1	North Judson	1
Hammond	3	La Porte	1
Munster	1	Walkerton	1
E. Chicago	2	Knox	1
Gary	6	South Bend	8
Michigan City	1	Culver	1
Portage	1	Mishawaka	1
Hobart	1	Elkhart	2
Valparaiso	1	Goshen	1
Chesterton	1		
	18		17



2

R 56 – 61.105

EXHIBIT C

IOWA AREA [illegible]

879a

BOWMAN DAIRY COMPANY PRICES, ON FILE WITH THE IOWA MILK COMMISSION

	LIST PRICE				NET PRICE	
	COMPANY BRAND		PRIVATE LABEL		COMPANY BRAND	PRIVATE LABEL
QTS. HOMO. V.D.	.25		.2425		.1850	.1795
1/2 GAL. HOMO. V.D. (GLASS)						
1/2 GAL. HOMO. V.D. (FIBER)	.45		.4350		.3330	.3219
GAL. HOMO. V.D. – GLASS	.80				.5920	
GAL. HOMO V.D. – FIBER	.90		.87		.6660	.6438
QTS. BOW-CAL						
PTS. SOURED HALF & HALF	.44				.3256	
PTS. HALF & HALF	.35				.2590	
QTS. RICH CREAM						
PTS. RICH CREAM						
1/2 PT. RICH CREAM						
QTS. WHIP CREAM						
1/2 PT. WHIP CREAM	.40		.39		.2960	.2886
"QUICK-WHIP" DISPENSER						
"REDDI WIP" DISPENSER						
GALS 2% – FIBER	.84		.81		.6216	.5994
PTS. SOUR CREAM	.55				.4070	
1/2 PTS. SOUR CREAM	.31				.2294	
1/2 GAL. BUTTERMILK			.445			.3293
QTS. BUTTERMILK	.255		.2475		.1887	.1832
QTS. DARI-RICH – WHOLE MILK	.285		.2775		.2109	.2053
1/2 PTS. DARI-RICH CARRY PACK						
1/2 PTS. CHOCOLATE SHAKE						
1/2 GAL. STA-FIT	.395		.38		.2923	.2812
QT. STA-FIT	.23		.225		.1702	.1665
1/2 GAL. 2%	.42		.405		.3108	.2997
YOGURT (Plain & Strawberry)	.255				.1887	
SNACK DIP						
C [illegible] 1/2 GAL FRUIT DR	37				.2738	
QTS. STRAWBERRY DRINK						
PKS. CREAM COTTAGE CHEESE – 8 OZ.						
PKGS. CREAM COTT. CHS. – 16 OZ.						
PKGS. CREAM COTT. CHS. – 32 OZ.						
PKGS. CHIVE COTT. CHS. – 16 OZ.						
PKGS. PINEAPPLE COTT. CHS. 16 OZ.						
PKGS. BAKERS COTT. CHS. – 16 OZ.						
SNACK DIP 8 OZ.						
1/2 GAL. FRUIT DRINKS						

MILK ORDER PRICE 4.27 CWT

[illegible] .10

STORES IN IOWA REGION

Independence	1
Dyersville	1
Cedar Rapids	1
Clinton	1
Davenport	2
Dubuque	2
Moline, Ill.	2
Waterloo	2
Cedar Falls	1
Savanna, Ill.	1
Rock Island, Ill.	1
Iowa City	1
Geneseo, Ill.	1
Galesburg	2
Total	21



Interest Refunds Received from Borden Company
By Wilco Food Center During Selected Time Periods

Date Received	Applicable to Month of	Amount
10/18/66	October 1966	$32.00
11/27/66	November 1966	31.50
1/4/67	December 1966	31.00
1/21/67	January 1967	30.50
3/2/67	February 1967	30.50
3/29/67	March 1967	28.50
10 Months Period Ending 3/31/70	-	-0-

Source: RAPX 24-28.

CX290

882a

THE BORDEN COMPANY
CHICAGO METROPOLITAN REGION
1821 S. KILBOURN AVENUE
CHICAGO, ILLINOIS 60623

AREA CODE 312 CRAWFORD 7-6400

October 1, 1965

Mr. E. R. Schmidt
The Great A & P Tea Company
2622 N. Pulaski Avenue
Chicago, Illinois

Dear Mr. Schmidt:

You have our price quotations dated September 21, 1965 for milk, cream and other dairy products for several areas in Indiana and Illinois. We wish to assure you that our prices are proper under applicable law and we are prepared to defend these prices.

We appreciate your patronage.

Sincerely,

THE BORDEN COMPANY
Chicago Metropolitan Region

J. G. Tarr

J. G. Tarr, Sales Manager
Chain Store Sales

RAPX 2

~~RXAUP 2~~

XID SA 6

Q And do you recall who it was that interviewed you?

A Yes, Mr. Palewicz.

Q And were stenographic notes taken of that interview?

A There was.

MR. MC INERNEY: Are those the notes he had introduced to us, Mr. Mathias?

MR. MATHIAS: Yes.

By Mr. Mathias:

Q Was there any prior interview of you by anyone on behalf of the Federal Trade Commission?

A No.

Q Now, Mr. Parr, in giving your final quotation to A&P for private label milk, did you feel that you actually had to meet the competitor's quote, the competitive quote?

A No.

Q Or only come close to it?

A Only close to it.

Q Was it your feeling and your belief that the Borden offer would have been accepted by A&P at a slightly higher price than the competitive quote?

A Yes, I believe that's true.

Q Now, when you made this final quotation, and when I speak of "final quotation," I mean the $820,000 saving offer, prior to your making that offer, did Mr. Schmidt in

RAPX 7A

any way suggest to you what your quotation should be?

A No.

Q When you gave that final quotation to Mr. Schmidt at that time or thereafter, did he tell you that you had actually met the competitor's price?

A Not -- no, he never said that.

Q Did you ask Mr. Schmidt what the competitive offer was?

A No.

Q And did he volunteer that information to you?

A No, never.

Q You never received that information?

A No. Don't know now.

Q Did you ask who the competitive bidder was?

A No.

Q And he didn't tell you that either?

A No.

Q Did you ask him whether the price that Borden was quoting was above the competitor's price or below the competitor's price?

A No.

Q Or precisely at the competitor's price?

A No.

Q You didn't ask him any of those things?

A No.

B

Q And he didn't volunteer any of that information?

A No, he didn't.

Q In any of your discussions with anyone on behalf of A&P, or any discussion at which you were present and anyone representing A&P was present, was the Robinson-Patman Act ever mentioned?

A Never.

Q Did you or anyone in your presence ever inform anyone from A&P or ever mention to anyone from A&P that the $820,000 saving offer was not cost justified?

A No.

Q Throughout these private label negotiations with A&P, did Elmer Schmidt or anyone from A&P make any misstatement to you or mislead you in any way?

A No.

Q Do you consider Mr. Schmidt to be an honest and truthful man?

A Yes.

Q Now, yesterday, at Page 497 of your testimony, you said in part, Line 7:

"You see, we couldn't operate in an area and someone else would be way under us, neither could we raise the price, neither could we go way under anyone else, because that would ruin the market too."

Now, my question is, wasn't it perfectly normal

business practice for you to meet competitors' prices?

A Yes, by the dairy industry, it's the same way.

MR. MC INERNEY: We have no further questions at this time, your Honor, until we get the documentary production that we have asked for.

HEARING EXAMINER SCHRUP: You are talking now about both the subpoena directed to the Secretary of the Commission and your application for the proposed subpoena relating to the testimony on the depositions?

MR. MC INERNEY: That's right, your Honor.

HEARING EXAMINER SCHRUP: Well, of course, in the order I have stated I think the matter of the subpoena directed to the Secretary of the Commission is premature, and that will be taken up during the pre-hearing conference, and it may eventually prove to be moot. It has in several cases I have had.

MR. MC INERNEY: Your Honor, of course, knows our position that the deposition is premature instead.

HEARING EXAMINER SCHRUP: I understand your position.

MR. MC INERNEY: Thank you.

HEARING EXAMINER SCHRUP: I gave consideration to it. I don't propose to change my ruling now.

Now, on your application for the subpoena duces tecum to Borden, I don't know how complete this voluntary return was

D

and that's a matter, of course, that will be taken up again at the pre-hearing conference. There's nothing that can be done about that today, and that will -- that may eventually prove to be moot. We don't know.

So that takes care of this situation so far except for the possibility of -- I don't say the possibility, the probability of redirect examination.

MR. MATHIAS: Could we have just a few minutes' break, your Honor?

HEARING EXAMINER SCHRUP: Very well.

MR. MATHIAS: So we can take a look at the record.

HEARING EXAMINER SCHRUP: Off the record.

(A short recess was taken.)

B.N.

HEARING EXAMINER SCHRUP: Back on the record. Proceed, Mr. Mathias.

REDIRECT EXAMINATION

By Mr. Mathias:

Q Mr. Tarr, at your meeting with Mr. Schmidt in early September, when he first informed you of the receipt of a competitive offer, did you make any attempt to determine the amount of the competitive offer that you were going to have to meet?

A I never asked him in that way or anything. I can't remember exactly what was said. Of course, I would have liked to have known.

Q Did you ask for any clues?

A I didn't ask any clues, no, but I kind of hoped that maybe he'd throw something out.

Q Well, did you carry on a conversation with him attempting to get some clues as to the area of the competitive bid?

A Well, not precisely that way. I was kind of hoping in the course of conversation something might come out. I kept talking and so did he.

Q How did you do this?

A I can't remember just what I said. I can't -- way back there I can't remember. But I was hoping that there would be --

F

B1N2

Q Did you do some fishing with Mr. Schmidt and try --

MR. MC INERNEY: Object to the form.

THE WITNESS: Well, no, the only thing --

HEARING EXAMINER SCHRUP: I'll let him answer.

MR. WHITE: There is an objection.

HEARING EXAMINER SCHRUP: Well, you understand what he means by the term "fishing"?

THE WITNESS: What was that?

HEARING EXAMINER SCHRUP: Do you know what counsel means by the term "fishing"?

THE WITNESS: Yes.

HEARING EXAMINER SCHRUP: You may answer.

THE WITNESS: I might have tried a little fishing, but I don't remember what I said or anything. There was nothing mentioned at all by me that -- like, "Elmer, can you tell me what the bid was or give me some clue of the thing," or anything like that. And neither did he volunteer anything. The only thing that ever made anything was when he said the $50,000 wasn't a drop in the bucket. If you remember, I testified as to that.

By Mr. Mathias:

Q Mr. Derr, I would like to show you the purported transcript of your statement to Mr. Palewicz on December 30, 1969, Pages 440 and 441, and ask you to read these two pages to see if these refresh your recollection as to some

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of the events at this early September meeting with Mr. Schmidt.

HEARING EXAMINER SCHRUP: Mr. Mathias, has this transcript been previously furnished to counsel for Borden and counsel for A&P?

MR. MATHIAS: Yes, it has, sir.

MR. MC INERNEY: Yes, sir.

THE WITNESS: Well, that's correct. He did, as I said before, he did mention Wanzer and Bowman, but he didn't say there were bids. I changed the thing down here, you remember.

By Mr. Mathias:

Q Now, I'm not asking you to testify as to anything that is written on these particular pages. All I wanted you to do is refresh your memory as to that particular day.

A I did a little, I said I did a little fishing.

HEARING EXAMINER SCHRUP: What's the date of that transcript?

THE WITNESS: But I don't remember what was said on that thing. There wasn't anything definitely --

HEARING EXAMINER SCHRUP: What is the date?

MR. MATHIAS: December 30, 1969. It's about two years ago.

By Mr. Mathias:

Q Well, this is exactly what I mean, Mr. Tarr. I didn't

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mean you necessarily put a straight question to him. You did make some attempt to determine how far Borden had to go in order to meet competitive offers?

A All I did was a lot of talking and hopeful that somewhere along the line, why, he would say something besides the $50,000. But that was one of the things, the only thing that he actually said that gave us any clue whatsoever.

But I did in my conversation, when I said I was fishing, I was trying to keep the conversation going, hopefully that something in the course of it would bring out the thing. But as far as any direct question or anything that would apply to that, that I didn't.

HEARING EXAMINER SCHRUP: I think I can understand your position. You consider this as a very important customer?

THE WITNESS: Yes.

HEARING EXAMINER SCHRUP: And you were rather walking on eggshells, is that it?

THE WITNESS: That's right. I knew I shouldn't ask him and I didn't. But I thought, you know, I thought maybe something would occur, he would drop some hint. And the $50,000 I thought was a hint, of course. In fact, it wasn't, it was a direct thing. But so vague, the $50,000 wasn't a drop in the bucket meant that it was an awful lot

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more than $50,000, an awful lot more.

MR. MATHIAS: I have no more questions, your Honor.

HEARING EXAMINER SCHRUP: Anything further from you gentlemen?

MR. WHITE: I have no further questions.

HEARING EXAMINER SCHRUP: Mr. McInerney?

MR. MC INERNEY: No, sir.

HEARING EXAMINER SCHRUP: You are excused, Mr. Tarr.

(Witness excused.)

MR. MATHIAS: Your Honor, I had requested Mr. Braun to have Mr. Malone here at 10:00. However, he said he could not do that, so he'd be here at 10:30. So I'm afraid we'll have to take a half hour adjournment.

HEARING EXAMINER SCHRUP: Rather than adjourn, I had mentioned -- I don't think you heard -- I mentioned to counsel for A&P and counsel for Borden that this would probably be a good time to discuss the timing of the first pre-hearing conference.

I don't think we need this on the record. We'll take a recess now until 10:30.

(Recess taken.)

HEARING EXAMINER SCHRUP: Back on the record.

Do you have a further deponent, Mr. Mathias?

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RAPX 16

THE BORDEN COMPANY
IOWA-CENTRAL ILLINOIS REGION
400 SIXTEENTH STREET
ROCK ISLAND ILLINOIS 61201

REGION OFFICE

August 3, 1967

Mr. D. R. Nelson
The Great Atlantic & Pacific Tea Company
Middlewestern Division
P. O. Box 419,
St. Louis, Missouri 63166

Dear Mr. Nelson:

We have attached schedule of prices in connection with deliveries to stores located in Hannibal, Louisiana, Bowling Green, Mexico, Jefferson City, Columbus and Kirksville.

These prices are based upon the terms and conditions as set forth and made a part of the price schedule attached. If you accept this proposal it will be necessary for Borden to secure a license for the Pekin, Illinois plant under the Missouri law. However, we expect no complications in respect to this detail. These prices, in our opinion, are proper under applicable law.

We thank you for the further opportunity to serve you.

Sincerely,

W. N. Waterstreet

WNW:ar
cc: W. K. Schools
S. W. Foss, Jr.

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RAPX 16

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THE BORDEN COMPANY
IOWA-CENTRAL ILLINOIS REGION
400 SIXTEENTH STREET
ROCK ISLAND ILLINOIS 61201

REGION OFFICE

August 8, 1967

Mr. D. R. Nelson
The Great Atlantic & Pacific Tea Company
Middlewestern Division
P. O. Box 419,
St. Louis, Missouri 63166

Dear Mr. Nelson:

In my letter of August 3rd I made the statement that the prices we quoted to you in that letter are, in our opinion, proper under applicable law. You may rest assured that when I made this statement we were fully acquainted with the requirements of the Robinson-Patman Act and the problem of availability. It was my intention in the August 3 letter in my succinct statement that the prices were proper under applicable law to cover any implications that may be required as to availability under the Robinson-Patman Act.

Sincerely,

W. N. Waterstreet

WNW:ar
cc: Wm. Schools

RAPX17

THE BORDEN COMPANY
IOWA-CENTRAL ILLINOIS REGION
400 SIXTEENTH STREET
ROCK ISLAND ILLINOIS 61201

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RAP 18

REGION OFFICE

September 2, 1967

Mr. D. R. Nelson
The Great Atlantic & Pacific Tea Co.
Middlewestern Division
P. O. Box 419
St. Louis, Missouri 63166

Dear Mr. Nelson:

We are pleased to submit and have attached a schedule of prices, per Schedule No. 1 which sets forth on the form provided the net prices covering the various milk products as requested.

The net prices as set forth represent milk products packaged under the A & P label at Borden's plant located at 231 Elizabeth Street, Pekin, Illinois and delivered on a three (3) day basis to your St. Louis area stores via a licensed contract carrier. The delivery charge as set forth represents the proposal of a licensed contract carrier, such proposal; however, being contingent upon such contract carrier's ability to secure necessary permits and authorities. In this regard the carrier will require a reasonable period of time to accomplish same.

These prices are subject to terms and conditions set forth on Schedule No. 2 - Terms and Conditions; Schedule No. 3 - Schedule of Butterfat and Ingredient Standards; Schedule No. 4 - Price Adjustment Schedule; Schedule No. 5 - Delivery Cost Adjustment Schedule; and Schedule No. 6 - Borden Case Packing Specifications.

Schedule No. 4 - Price Adjustment Schedule provides for the automatic adjustmentsin prices covering changes, up or down, in the Pekin, Illinois Class I Federal Order price, plus fees and premiums, as such price relates to the raw milk cost per hundredweight as set forth on Schedule No. 1.

Schedule No. 5 - Delivery Cost Adjustment Schedule provides for the automatic adjustment in prices where the "volume ordered for delivery to your stores is less than the considered efficient trailer load volume of 530 cases or 12,720 points on which the delivery cost factor of $.0143 per point has been based." This volume is also related to a eight (8) store group, and we believe that a scheduling program can be developed in this regard to bring about the optimum cost results desired.

In the event this proposal is accepted, it will be necessary for Borden's to secure permits from the St. Louis City and County Health Departments; and we expect no complications in this regard.

RAP 1

Also as previously indicated, the contract carrier effecting delivery will have to secure the necessary approvals from the required sources involved.

These prices in our opinion are proper under applicable law.

We thank you for the opportunity to serve you.

Sincerely,

W. N. Waterstreet

WNW:ij

Encl.

1" = 1'A&P x 156

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PROPOSALS

Construction of New Plants and Branch Facilities at Chicago to Replace Existing Plants and Branch Facilities at Chicago, Illinois and Hammond, Indiana

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Other Cost Savings
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Section No. 1

Summary of Capital Requirements and Savings Resulting from the Construction Of a New Milk Plant and Necessary Distributing Facilities to Replace the Tripp Avenue - Irving Park Plant and Branch and the Hammond Plant and Branch

Where Will The Plant Be Located

Because of the saving that can be realized by direct farm tank raw milk deliveries to a processing plant, located in the heart of the milk production shed, this new milk plant will be in the Federal Order #30 70 mile zone, approximately that distance from downtown Chicago.

Savings To Be Realized

Total annual savings that will be realized after expected economies are effectuated - $1,512,500.

Where These Savings Come From

Raw Product Costs	$ 505,962	
Manpower resulting from full mechanization in processing and material handling	1,068,363	
All Other Economies	207,518	
Gross Annual Savings		1,781,843
Less - Increased Transportation Costs		269,343
Total Net Savings		$1,512,500

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Capital Requirements

	Land	Buildings	Machinery & Equipment	Total
Tripp - Irving Park	$175,000	$2,484,000	$2,342,553	$5,001,553
Hammond	30,000	197,000	20,000	247,000
Total Cap. Required	205,000	2,681,000	2,362,553	5,248,553
Present equipment that will be used in new plant			50,276	50,276
Total capital in new facilities				$5,298,829

Estimated Dec. 31, 1964 value of present properties to be sold or disposed of or used in other plants (1) 3,188,149

Net increase in book value of these facilities after disposition of present non-usable properties & equipment $2,110,680

Before tax return on initial capital requirement 28.8%

Before tax return on net increased employed capital after disposal of present and non-usable property and equipment 71.6%

1) These remaining values as of December 31, 1964 do not consider the further reduction in machinery and equipment values occasioned by our double declining depreciation, which became effective on machinery and equipment items purchased, beginning January 1, 1954.

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	LAND	BLDGS	EQUIPT	TOTAL
PLANT IN COUNTRY	$100 000	1,825,000	2,151,553	4,076,553
ADD. HAMMOND'S VOL.		124000	146 000	270 000
TOTALS FOR COUNTRY PL	$100 000	$1947000	$2,297553	4346,553
LAND ADD (SOUTH SIDE STARCH)	LEASE	230000	20000	250000 P1
- Irving Park Branch	75000	305000	25000	405000 P10
	175000	2484000	$2342553	5001553
HAMMOND BL.	30000	197000	20000	247000
TOTAL EXP	205000	2681000	2362553	5248553
Present Project	251704	766838	76761	2184303
	46704	714169	1485213	2100000

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Section No. 2

Outline of Project and Considerations Relating to Construction of New Plant and Branches at Chicago, Illinois

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Disposition of Present Properties, Machinery & Equipment

Buildings, land and building equipment that will be transferred to Real Estate Dept.	$2,218,535
Machinery and equipment we will use in new plant	50,276
Machinery and equipment we can use in other Central Division plants	639,228
Machinery and equipment not usable in our Division but in good condition and available for transfer to other Borden operations or will be sold	251,381
Machinery and equipment to be scrapped	28,729
Estimated December 31, 1964 net depreciated values of all disposable and usable properties, machinery and equipment	$3,188,149

Reduction In Manpower.

	Present	Remaining	Reduction
Chicago - Processing	193	128	65
Chicago - Route Loaders	40	28	12
Hammond - Processing	54	18	36
Hammond - Route Loaders	7	5	2
			115

Points Produced (1961)	189,458,940
Estimated annual points that will be produced in new plant	198,500,000
Processing and material handling cost saving per point	.00507
Raw product cost saving per point	.00255
Total saving per point of milk produced	.00762

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Section No. 2

PROPOSED NEW MILK PLANT AND DISTRIBUTION BRANCHES TO REPLACE THE CHICAGO TRIPP AVENUE MILK PLANT AND THE HAMMOND, INDIANA, MILK PLANT, AND CERTAIN DISTRIBUTING BRANCHES

The present Tripp Avenue plant and Irving Park distribution branch are located in the northwestern part of Chicago. This large plant and branch complex has developed over the years from an original Wieland Dairy Company plant which was acquired by The Borden Company in 1928. The original small plant was constructed by the Wieland Company in 1921. Prior to the Borden acquisition, the plant facilities were greatly expanded by building around and over the original small plant while continuing to operate the small plant.

During the intervening years, The Borden Company continued to expand the facilities by constructing additional operating areas around all parts of the building.

This type of expansion, starting with the Wieland construction of a shell around an existing plant, and progressing through the Borden additions, has resulted in a sprawling, disjointed operation with similar functions scattered widely. As an example, the plant has five different filling rooms. The operations are distributed over three floors, including a basement. These additions have exhausted all available land, and have resulted in extremely crowded operating conditions for the movement of distribution vehicles.

The above combination of factors has made it extremely difficult to maintain reasonable operating efficiency, and it is impossible to achieve maximum efficiency.

The Tripp plant receives and processes approximately 6,000,000 pounds of milk per week, and operates on a five day week with an average daily processing of 1,200,000 pounds, including cottage cheese manufacture.

It produces for the Irving Park and Holland Road wholesale branches, the five Chicago retail branches, four outlying wholesale and retail branches, including Rockford, Illinois, and produces cheese and some by-products for the Hammond, Indiana region.

Present Facilities (Hammond, Indiana)

The present Hammond, Indiana, operations consist of a fluid milk processing plant, and a milk and ice cream distributing branch located near downtown Hammond. This operation serves northwest Indiana, East Central Illinois, and a small part of southwestern Michigan.

The existing plant was built by the predecessor company in 1923, and was acquired by The Borden Company in 1929. Over the years, several additions have been constructed around the original two story, plus basement structure.

The plant receives and processes approximately 1,800,000 pounds of milk per week, and operates on a five day week with an average daily processing of 360,000 pounds.

Proposed New Facilities

It is proposed to abandon the present Tripp-Irving Park plant and distributing operation, and the present Hammond plant and distributing operation. There would be constructed a new milk processing plant, a new Irving Park wholesale route and vendor distributing branch, improved facilities, including chill room at a south side distributing branch, and a new wholesale and retail distributing branch for the Hammond-Gary, Indiana, area, for both milk and ice cream.

The new milk processing plant would be a fully mechanized, palletized single structure plant, from which only trailers for the transportation of finished product would be loaded. It is to be located close to fast-moving

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traffic arteries, about 70 miles northwest of Chicago, in the heart of the Chicago milk producing shed.

Reasons for this new plant

Present Chicago and Hammond milk plants, while modernized considerably in recent years, enabling us to close three metropolitan Chicago milk plants, at a total estimated cost reduction in processing and material handling of approximately 2 million dollars over the past five years, nonetheless, cannot be further improved to the maximum degree required to insure future reasonable profits and growth under present day exceedingly tough competitive conditions. Projected annual savings are estimated at $1,512,000 when the full potential is attained. Little, if any, further operating savings are realizable at present plants regardless of capital expenditures.

Why build a milk plant
70 miles from Chicago?

While there are considerable indeterminate values as relate to labor stability in a small town v. metropolitan Chicago, there are quite important economic factors favoring the location of a milk processing plant in the 70-mile zone Federal Milk Marketing Order area. First, and of most importance, is the saving to be realized in raw product cost by the elimination of a country receiving station and receiving of milk from direct farm tank pick-up trucks. For the first two years annual savings will be $222,182. The next year they will be $384,342. Thereafter such savings will be $505,962 annually. There will also be savings in raw product transportation costs of $306,980 annually. Combined, then, such savings, after the second year will be $812,942 annually. Since added finished product transportation costs will be increased over present costs, $576,323 annually, savings resulting from the location of

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this plant (metropolitan Chicago location v. 70 miles from Chicago location) will be $236,619 annually.

Before we would begin construction of this plant, we would enter into an agreement with the Pure Milk Association, a producers cooperative, to sell us four of their receiving plants in the 70-mile zone, and diverting the milk to our new plant. This agreement can be made. Its costs are calculated in our raw milk prices.

Investment

Before we closed our Englewood, Chestnut Street and Belmont plants, our net investment in land, buildings, and equipment which is considered part of the buildings, in metropolitan Chicago and Hammond, was $1,874,175. With no further charge, except depreciation, to Dec. 31, 1964, the year in which we would expect to get into these new facilities, the present properties will have a net value of $2,218,535. Our investment in land, buildings and equipment, therefore, is up $344,360. As stated earlier, however, this added investment in these properties over the past five years has cut our processing and material handling costs at least 2 mills per point, equalling 2 million dollars.

Machinery and equipment, in addition to land and buildings for Chicago and Hammond plants will have a net remaining book value on Dec. 31, 1964, of $969,614. Since we cannot move very much of this equipment to the new plant because of physical operating problems, and also because of larger capacity equipment, it is intended that we use some of this equipment in other Central Division plants in the two succeeding years, transfer to other Borden Districts, or sell on the outside.

Estimated costs for new facilities are $205,000 for land, $2,681,000 for buildings, $2,362,553 for equipment or a total cost of $5,248,553. Since

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the Dec. 31, 1964 investment for present facilities, which are to be replaced, will be $3,188,149, gross investment in old and new facilities before sale and disposal of non-usable land, buildings and equipment, will be $8,436,702. But, since the transfer of land and buildings to our Real Estate Department will be $2,218,535, and machinery and equipment valued at $919,338 will be disposed of, the investment in these properties after consummation of this project will be $5,298,829. This compares with estimated Dec. 31, 1964, values of present facilities of $3,188,149. Increased investment after completion of project and property disposal will be $2,110,680, which increased investment will be returned based on annual savings of $1,512,500 in 1.39 years.

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Section No. 3 - Investment

Estimated Cost of Construction, Machinery and Equipment to Replace Existing Plant and Branch Facilities at Chicago, Illinois and Hammond, Indiana

The proposed plant would be a single story structure located on about 15 acres in an area approximately 70 miles from Chicago in the center of a major milk producing area.

The plant would be fully automatic and the movement of finished goods would be on pallets. No route distribution operations are planned at this point and the plant would handle trailer loading only. The loading operations at the Irving Park, South Side and Hammond locations will be pallitized to the fullest extent possible under the new construction being provided for at each branch location.

Practical operating considerations prevent the utilization of existing machinery and equipment in the new plant because of the necessity of having the new plant operating before the old plant is shut down. It is the consideration that much of the old plant machinery and equipment be utilized in other Central Division plants thus reducing somewhat subsequent capital budget requests.

The estimated cost of construction, machinery and equipment to replace existing plant and branch facilities is as follows:

New Country Processing Plant	
Land	$ 100,000
Building	1,949,000
Machinery and Equipment	2,297,553
Total	$4,346,553
New South Side Branch	
Land	Leased
Building	$230,000
Machinery and Equipment	20,000
Total	$250,000

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New Irving Park Branch

Land	$ 75,000
Building	265,000
Truck Repair Building	40,000
Machinery and Equipment	25,000
Total	$405,000

New Hammond Branch

Land	$ 30,000
Building	197,000
Machinery and Equipment	20,000
Total	$247,000

Grand Total

Land	$ 205,000
Buildings	2,681,000
Machinery and Equipment	2,362,553
Total New Investment	$5,248,553

In addition certain machinery and equipment presently in use will be utilized having a value of $50,276.

The total investment in the new plant and branch facilities amounts to $5,298,829 as follows:

Land	$ 205,000
Buildings	2,681,000
Machinery and Equipment	2,412,829
Total	$5,298,829

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Present Investment

The present investment (net) in plants and equipment computed as at December 31, 1964 is as follows:

	Chicago	Hammond	Total
Land	$ 83,210	$168,494	$ 251,704
Buildings	1,452,661	514,170	1,966,831
Machinery & Equipment	721,728	247,886	969,614
Total	$2,257,599	$930,550	$3,188,149

Disposal of Present Properties

The Chicago office of the Real Estate Department has estimated a sale value of the land and buildings to represent the following:

Chicago	$500,000
Hammond	137,000
Total	$637,000

The machinery and equipment has been reviewed as to categories of use, and/or disposal which discloses the following status:

Considered usable for subsequent requirements for plant changes in other Central Division plants.	$ 639,228
Subject to transfer to other plants or sale.	251,381
Usable in new plant.	50,276
To be scrapped.	28,729
Total	$ 969,614

This additional capital investment remaining after existing facilities are sold and/or used in operations would represent the following:

	Land	Buildings	Machinery & Equipment	Total
New Investment	$205,000	$2,681,000	$2,412,829	$5,298,829
Present Investment	251,704	1,966,831	969,614	3,188,149
Increase	($ 46,704)	$ 714,169	$1,443,215	$2,110,680

The machinery and equipment considered usable for subsequent requirements for plant changes in other Central Division plants is not considered as increased investment as such would replace future capital budget requests. While this equipment has a net value of $639,228 as of Dec. 31, 1964, its original cost amounted to $1,375,956.

The net value of the present facilities computed to Dec. 31, 1964 does not include or recognize additional depreciation accruing to buildings and equipment purchased in 1954 and subsequent years under the declining depreciation method, which additional depreciation is not recorded per the Division books but which will be included in any tax computation made covering the disposal of such property.

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Section No. 4 - Annual Savings

Estimated Annual Savings Resulting from Construction of New Plants and Branch Facilities at Chicago, Illinois and Hammond, Indiana to Replace Existing Facilities

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Annual Savings

This project it is estimated will produce annual savings of $1,512,500 as follows:

Savings on Raw Milk Procurement	$ 505,962
Savings on Decreased Manpower Required	1,068,363
Savings on Reduction in Other Costs	207,518
Sub-total	$1,781,843
Deduct: Increased Transportation Costs	-269,343
Total Net Savings	$1,512,500
Return on Investment	28.8%

1,512,500 = 28.54%
5248,629

1,512,500 = 5,2547.
288

1,512,500 = 9,67 %
5248,629

These savings result from the construction of new plants and branch facilities at a cost of $5,248,553 which investment is returned at a rate of 28.8% annually.

This investment however, only represents the employment of additional capital of $2,110,680 over the current investment for the land, buildings and equipment used currently to service the Chicago and Hammond requirements.

With the exception of raw milk savings, all of the cost savings are attainable during the first year of the new plant and branch operations. The progression of raw milk savings is as follows:

First 24 months of operation	$222,182 annually
Next 12 " " "	$384,342 "
Subsequently Thereafter - Attainment of Full Supply Requirement	$505,962 annually

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Section No. 5 - Raw Milk

Detail Information in Regard to Raw Milk Cost Savings Resulting from Construction of New Plants and Branch Facilities at Chicago, Illinois and Hammond, Indiana to Replace Existing Facilities

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Raw Milk

The present major source of raw milk supplies is the Pure Milk Association, a producer co-operative, which operates numerous country receiving plants throughout Illinois and Wisconsin. From these country plants the milk is hauled in over-the-road tankers to the Tripp plant.

Our current buying arrangement provides for the payment of 27.5 cents per 100 pounds over the Federal ordered price f. o. b. the country plants. This price includes 10 cents per 100 for farm bulk tank premium and the balance provides for the receiving plant charge.

The proposed plant would be located approximately 70 miles from Chicago in the center of a major milk producing area. In this area the Pure Milk Association operates four country plants which they have agreed to abandon and allow the milk to come to our plant in bulk tankers direct from the farm. The four receiving plants would be sold and the difference between the sale price and the book value would be amortized by the Borden Company paying 2 cents per 100 until paid for. The approximate net amount to be amortized would be $100,000.00, which would be paid off in approximately 1-1/2 years.

The Pure Milk Association has agreed to the following price arrangement over the Federal ordered price:

Bulk Tank Premium	.10 per 100
Field Service and Check Writing	.05 per 100
Amortization of Receiving Plants	.02 per 100
Temporary Premium to Assure Supply	.05 per 100
Plant Location Adjustment	.02 per 100
Total	.24 per 100
Net Saving	.035 per 100

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The present total raw milk requirements for Chicago are approximately 6,000,000 pounds per week of which 900,000 pounds are required for cottage cheese and 5,100,000 pounds for all other needs. The annual requirements would be 265,200,000 pounds for all other needs and 46,800,000 pounds for cottage cheese.

The immediate annual savings on the milk and other than cottage cheese, based on a 3.5 cents reduction, would be $92,820.00. (265,200,000 x .035 per cwt.)

The present cottage cheese milk requirements are procured through buying skim milk at a price of $1.13 per 100 pounds f.o.b. the Chicago plant. It is proposed to purchase whole milk on the above basis and separate to provide skim and butterfat requirements. The surplus butterfat will be utilized in our Fond du Lac butter manufacturing operation.

Based on an estimated average Class III Federal Order price of $3,0375 and a price of 122 over the estimated average price of 93 score butter of .5750 for the surplus fat f.o.b. Fond du Lac, the annual savings would be $98,540.00.

The four Pure Milk Association plants would be able to supply on a daily basis from 700,000 pounds in the flush season to 550,000 pounds in the short season.

The total daily requirements on a seven day basis would be 860,000 pounds. The balance of the requirement would be developed by taking on existing other producers in this area, using as an incentive the 5¢ per hundred premium.

Upon the full development of the total supply and the elimination of the amortization charge for the receiving plants, an additional saving of the premium plus amortization of 7¢ per hundred can be realized. On an annual basis

this will provide additional savings of $218,400.00 based on total requirements of 312,000,000 pounds annually.

The Hammond annual requirements of 93,400,000 pounds is procured from can, bulk tank and long haul tank sources and averages out at a cost of 27.3 cents over the ordered price exclusive of Market Administrator and Milk Foundation charges. Under the proposed buying arrangement, the cost would be 24 cents over for a net saving of 3.3 cents per 100, with an annual saving of $30,822.00. This is f.o.b. plant in both cases, and further raw milk transportation savings will not accrue in the Hammond operations.

Upon the elimination of the 7 cents premium and amortization charge, an additional annual saving of $65,380.00 can be realized.

A summary of the above indicated savings resulting from the construction of new plant facilities in the area of farm milk production is as follows:

Savings During First 12 Months

Chicago Raw Milk Receipts 265,200,000 x .035 per cwt.	=	$ 92,820
" Cottage Cheese Separation & butterfat disposal	=	98,540
Hammond Raw Milk Receipts 93,400,000 x .033 per cwt.	=	30,822
Total First 12 Month Savings		$222,182

Savings During Second 12 Months - Same as above.

Savings During Third 12 Months

Total Savings Shown in Detail for First 12 Months	$222,182
Add: Additional savings due to the elimination of the amortization charge for receiving plants and the elimination of 40% of the premium payment	$162,160
Total Third 12 Month Savings	$384,342

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Savings During Fourth 12 Months

Total Savings Shown Above for Third 12 Month Period	$384,342
Add: Elimination of the remainder of premium payment based on the full development of the full supply	$121,620
Total Fourth 12 Month Supply	$505,962

Total Estimated Annual Requirements

For Fluid Milk Requirements	358,600,000 lbs.
For Cottage Cheese Requirements	46,800,000 "
Total Estimated Annual Requirements	405,400,000 lbs.

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Section No. 6 - Labor

Detail Information in Regard to Labor Cost Savings Resulting from Construction of New Plant and Branch Facilities at Chicago, Illinois and Hammond, Indiana to Replace Existing Facilities

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At the present time 165 employees are engaged in production and trailer loading operations at the Chicago Tripp Ave. Plant, 40 employees are engaged in loading and unloading route vehicles at the Chicago Holland Road and Irving Park branches and 54 employees are engaged at the Hammond, Indiana plant in production and trailer and route truck loading and unloading or a total of 259 employees.

These employees are members of Locals 754 and 835 (Teamster) and do not include management personnel, laboratory workers, fieldmen, engineers, and mechanics.

It is estimated that based on present production and sales requirements the proposed facilities would require a total of 156 employees as shown below by functional requirements.

Classification	Number of Men Required			
	Total	New Plant	Irving Pk. and Holland Road	Hammond Branch
Receiving	4	4		
Processing	7	7		
Filling & Packaging	42	42		
Cottage Cheese Making	7	7		
Trailer Loading & Cooler	21	21		
Trailer Unloading	5	5		
Clean-up	16	16		
Case Room	5	5		
Dry Storage	3	3		
Rest Period Relief	4	4		
Working Foremen	5	5		
Office	4	4		
Route Vehicle Load & Unload	33		28	5
Total	156	123	28	5

engine room completely automatic, and 5 management supervisors and 2 fieldmen will be eliminated.

922a

The total labor savings inclusive of fringe costs will result in annual savings of $1,068,363 as follows:

	Annual Savings
Chicago	
60 Production and Trailer Loading men eliminated at an average annual wage cost of $9,607.92 including fringe costs	$576,475
5 operating Engineers reduced at an average annual wage cost of $10,150.40	50,752
Elimination of contracted outside electrician and steam fitter labor	6,572
Reduction of 12 Route Loading Men at Holland Road and Irving Park branches at an average wage cost of $9,672 - including fringe costs	$116,064
Sub-total Chicago	$749,863
Hammond	
21 Production men, plant mechanics and engineers reduced at an annual wage cost of $8,920 - including fringe costs	$187,320
10 Trailer and Route Loaders reduced at an annual wage cost of $8,025 - including fringe cost	80,250
5 Supervisors and 2 Field Men reduced	63,296
Increased Wage Cost due to higher wage rates under the Chicago Union contract covering 18 men.	(12,366)
Sub-Total Hammond	$318,500
Grand Total Annual Labor Savings	$1,068,363

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Section No. 7 - Transportation

Detailed Information in Regards to Increased Transportation Costs Resulting from Construction of New Plant and Branch Facilities at Chicago, Illinois and Hammond, Indiana to Replace Existing Facilities

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Transportation Costs

The location of the plant in the 70 mile zone will result in a 11.5 cents per hundred saving in raw milk transportation on annual requirements of 265,200,000 pounds exclusive of cottage cheese milk, which will result in an annual saving of $306,980.00.

Increased transportation costs on finished product to Chicago branches will amount to $271,500.00 annually. The present fleet of 74 trailers and 17 tractors will be adequate to handle the proposed operation. The areas of increased costs are as follows:

Trailer Costs	$ 12,600.00
Tractor Costs	130,300.00
Driver Costs	105,900.00
Tollway Costs	22,700.00
Total	$271,500.00

The delivery of Canco milk containers, which is presently freight free, will be increased by $10,135.00 annually.

Note: [illegible] applicable on Cost Label Items

Increased transportation costs on finished products to Hammond will amount to $294,688.00 annually. This is based on an analysis of proposed distribution operations originating at the new plant. Most of the present Hammond transport operations are handled by outside contractors at a 30 cents per mile charge with the Borden Company furnishing the trailers. The proposed increased mileage is calculated at the 30 cent rate.

It is estimated that the merging of the Hammond and Chicago tractor-trailer fleets will provide enough rolling equipment.

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Transportation

A summary of total transportation cost changes discloses the following:

	Decreased Cost	Increased Cost	
Raw Milk Transportation	$306,980		
Finished Products to Chicago		$271,500	
Hauling of Canco Containers		10,135	
Finished Products to Hammond		294,688	
Totals	$306,980	$576,323	
Net Increased Cost Annually			$269,343

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Section No. 8 - Other Cost Savings

Detailed Information in Regard to "Other Cost" Savings Resulting from Construction of New Plant and Branch Facilities at Chicago, Illinois and Hammond, Indiana to Replace Existing Facilities

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Other Cost Savings

Annual savings covering other elements of cost and overhead and burden are estimated at $207,518.

These represent the following items:

Item

Utilities — Annual Saving $50,000

The total expenditure for utilities at Hammond amounted to $66,000 annually. Of this amount only $6,000 - will be required for the Branch operation. It is estimated that approximately 50% of the remainder or $30,000 will be saved. In addition the projected overall more efficient use of facilities is estimated to reduce present Tripp Ave. costs by $20,000

Repairs to Buildings and Equipment — Annual Saving $55,000

This estimate is projected on the basis of repair and maintenance cost experience over the past several years at Tripp Ave. compared with experience at modern automated plants plus the elimination of the Hammond operation where repairs averaged $50,000 - annually.

Cleaning Materials — Annual Saving $20,000

Represents the more efficient use of cleaning powders, liquid cleaners, etc. as well as savings from the closing of the Hammond plant.

928a

Leased Property — Annual Saving $16,650

Represents the decreased cost of parking lots and buildings at Hammond.

Depreciation — Annual Saving $44,082

Represents decreased depreciation on new buildings and machinery and equipment compared to present properties.

Property Taxes — Annual Saving $12,547

Represents decreased property taxes on new buildings and machinery and equipment compared to present taxes and is based on data furnished by the Chicago Real Estate office.

Miscellaneous Other Expense — Annual Saving $15,000

Represents estimate of other decreased costs based on review of cost elements at Chicago and Hammond Plants.

Wood Pallets — Annual Increased Costs ($5,791)

Based on the use of 4,964 pallets in service at a cost of $3.50 each such costs amortized on a 36 month basis.

Total Net Annual Savings — $207,518

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Section No. 9 - Non-Recurring Expenses

Detailed Information in Regard to Non-Recurring Costs Resulting from the Construction of New Plant and Branch Facilities at Chicago, Illinois and Hammond, Indiana to Replace Existing Facilities

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Non-Recurring Expenses

During the first twelve months certain costs will be incurred in connection with the project which are non-recurring as follows:

Item	Estimated Cost
New Rear Doors for 94 Trailers and 50 wholesale trucks to provide for pallet loading.	$ 72,000
Estimated Severance Pay for 108 men at $1,000 - per annum.	108,000
Total Non-Recurring Costs	$180,000

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Section No. 10

Equipment Detail

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Equipment Detail - New Processing Plant

Engine Room

Refrigeration - Entire Plant	$260,000
2 - Air Compressors	22,000

Boiler Room

2 - 600 H.P. Boilers	40,000

Milk Receiving Room

3 - Flow Meters	6,000
3 - Parts Washers	1,500
Load Cells	10,000

Processing Room

3 - 60,000# Clarifiers	75,000
4 - 10,000# Cold Milk Separators	28,350
2 - 60,000# HTST Systems with Homos	126,000
1 - 20,000# HTST System with Homo	30,500
10 - 1500 gal. Round Processing Vats	92,740
2 - 500 gal. Round Processing Vats	11,630
1 - Liquid Sugar System	Leased
6 - Parts Washers	15,000
9 - 25,000 gal. Silo Milk Storage Tanks	193,000
10 - 10,000 gal. Silo Milk Storage Tanks	152,300

Filling Room

2 - Gallon Pure Pak Fillers	Leased
3 - 1/2 gal. Pure Pak Fillers	Leased
1 - Quart Pure Pak Filler	Leased
4 - Canco Fillers	Leased
3 - Paper Dispenser Can Fillers	Leased
1 - Grace Cheese Mixer	Available
1 - Anderson Cheese Filler	Available
1 - Gallon Pure Pak Case Packer	14,000
3 - 1/2 gal. Pure Pak Case Packers	34,800
1 - Quart Pure Pak Case Packer	11,600
4 - Canco Case Packers	52,466
1 - Lot Paper and Glass Bottle Conveyor	50,000
1 - Lot Case Conveyor	137,000
1 - Glass Bottle Case Packer	14,400
1 - Glass Bottle Filler	16,000
10 - Case Stackers	38,600
1 - Cheese Carton Packer & Case Sealer	25,000

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Equipment Detail - New Processing Plant (Continued)

Case Room	
1 - Bottle Washer	$ 20,000
3 - Case Washers	12,000
3 - Case De-Stackers	17,400
1 - Glass Bottle De-Caser	16,910
1 - Can Washer	6,000
2 - De-Palletizing Machines	40,000
Chill Room	
3 Palletizing Machines	60,000
Sanitary Piping and Valves	
Completely automated sanitary piping and valve system	261,000
Cleaned In Place System	
Automated C.I.P. system for lines, tanks and vats	60,000
Bulk cleaning materials handling system for cleaners, liquid caustic and conveyor lubricant	20,000
Cottage Cheese Make Room	
6 - 30,000# Cheese Vats	39,000
1 - Curd-O-Matic Machine	28,000
12 - Jet Cookers	2,100
6 - 1500 gal. Starter and Mix Vats	55,700
1 - Cheese Can Washer	6,000
2 - 3000 gal. Cream Tanks	10,000
1 - 10,000 gal. Chilled Water Tank	15,000
1 - Water Chiller	10,000
1 - 1500 gal. Homogenizer	Available
Dry Storage Room	
Storage Racks	12,000
Dock - Loading and Unloading	
1 - Dock Leveler	2,500
6 - RST 30 Automatic Fork Trucks	30,000

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Equipment Detail - New Processing Plant (Continued)

Dock - Loading and Unloading (Continued)

2 - WP-42250 Automatic Fork Trucks	$ 3,800
Batteries and Chargers	12,000
Total	$2,197,296

Summary - Equipment Detail - New Processing Plant

Total Estimated List Price	$2,197,296
Estimated Discount	100,000
Estimated Net	$2,097,296
Illinois Sales Tax	62,918
Freight	22,000
Installation	114,339
Total	$2,296,553

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ADDENDUM

TO

PROPOSAL

Construction of new plant and branch facilities at Chicago to replace existing plants and branch facilities at Chicago, Illinois and Hammond, Indiana.

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ADDENDUM

The purpose of this addendum is to bring all factors relative to proposals concerning the new Chicago plant and branch facilities to a current status.

The decision has been made to locate the plant on the U. S. Highway 14 By-Pass on a 24 acre site contiguous to the City of Woodstock, Illinois. We are proceeding to work out a system of ingress and egress to Highway 14 that will provide maximum vehicle safety operations. A nationally known traffic engineering consultant has been retained to advise us on this matter, and he is presently working with state and county highway officials to provide the necessary facilities. He has assured us that this matter can be worked out to our satisfaction. We will then proceed to secure annexation and zoning from the city, and we do not anticipate any unusual problems connected with this matter. The cost of this site will be $55,000.

We have agreed to participate with the City of Woodstock in construction costs relative to expanded water and sewage facilities to adequately serve our water and normal milk plant sewage. The total estimated cost of this expansion is $343,000, and we have agreed to pay $125,000 of this amount.

We have agreed with the city to handle our own cottage cheese whey disposal. It is our intention to direct maximum efforts towards developing a whey derived food, and it is our belief that we will be successful to the extent, at least, of realizing a return equal to all costs including depreciation. The estimated costs of these facilities are $250,000. We do not estimate that the solution to this problem will be completely resolved in time to need these

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facilities upon completion of the milk plant. We, therefore, will [illegible] these funds until 1965. During this interim period, we will haul the whey from the plant.

The current estimate of machinery and equipment capital requirements for the Woodstock plant is $2,427,653, which represents an increase of $131,100 over the original projection. This more recent estimate is based on a more thorough and exhaustive study, including current quotations, than was possible at the time of the original presentation.

Summary of Current Status of Estimated Capital Requirements

Location	Land	Buildings	Equipment	Total
Woodstock, Illinois				
New Plant	$ 55,000	$1,919,000	$2,427,653	$4,401,653
Sewage & Water	125,000	--	--	125,000
Whey Food Plant	--	75,000	175,000	250,000
Total Woodstock	$180,000	$2,024,000	$2,602,653	$4,806,653
Chicago Branches				
New Irving Park Branch	$ 75,000	$335,100	$ 55,000	$465,100
New Holland Road Branch	Leased	* 150,000	148,000	298,000
New Hammond Br.	30,000	152,300	25,000	207,300
Total Branches	$105,000	$675,600	$122,000	$902,600
Total Plants and Branches	$285,000	$2,699,600	$2,724,653	$5,709,253

* It may be desirable to lease the Holland Road building

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Comparison of Current Versus Original Projection of Capital Requirements

	Current	Projected	Increase (Decrease)
Woodstock Land	$ 55,000	$ 100,000	$ (45,000)
Woodstock Plant Building	1,949,000	1,949,000	--
Woodstock Machinery & Equipment	2,427,653	2,296,553	131,100
Sewage and Water	125,000	none	125,000
Whey Food Plant	* 250,000	none	* 250,000
Chicago Branches (3) (Buildings, land, machinery and equipment)	902,600	902,000	600
Total	$5,709,253	$5,247,553	$461,700

* Not required until 1965.

Current Status of Estimated Annual Savings

The estimated annual savings after expected economies are effectuated remain the same as in the original proposal - $1,512,500.

This is based on the same original assumption that the total required capital would be available as cash. Should all or part of these funds be acquired through lease arrangements, estimated annual savings would have to be reduced by the increased cost of this source of funds. Leased funds would, of course, change our projected $2,110,680 net increase in employed capital.

The projected annual savings are also based on our plan to develop a successful whey food that will return sufficient revenue to cover all costs. Should we have to resort to a whey disposal sewage system, it is estimated that projected

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annual savings would have to be reduced by $30,000.

The added depreciation cost of the relatively small amount ($131,100) of increase over projected depreciable capital will be absorbed without affecting estimated annual savings.

Estimated Effect of Various Leasing Alternatives on Projected Annual Savings

Lease Woodstock Building and Land		
Estimated Cost of Building	$1,949,000	
Estimated Cost of Land	180,000	
Total	$2,129,000	
Based on a rate factor of 6.50% including interest and principal, Annual Cost =	$138,385	
Projected Depreciation Annual Cost $1,949,000 - 50 year life	38,980	
Net Reduction in Projected Annual Savings	$ 99,405	$ 99,405
Lease Woodstock Plant, Machinery & Equipment		
Estimated Cost of Machinery & Equipment	$2,427,653	
Based on interest rate of 4.75%		
First Year's Net Reduction in Projected Annual Savings		$115,313

Note: Average net reduction in projected annual savings over the life of the equipment would be approximately $57,656.

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Lease Woodstock Building, Land & Equipment

Net savings reduction, land & building	$ 99,405	
Net savings reduction, machinery & equipment	115,313	
Total net reduction in projected annual savings - building, land & equipment		$214,718

Lease Holland Road Branch Building

The existing Holland Road Branch operations are conducted on leased land. It is possible that the present lessor would be interested in an expanded lease arrangement that would include the proposed new building. Such an arrangement would reduce the required capital by $187,700 and would reduce the projected annual savings by an estimated	$ 11,255

Lease Alternative Effects on Employed Capital

Original Projection Net Increase in Employed Capital	$2,110,680
Add Current Projection Increased Capital Requirements	461,700
Current Projection Net Increase in Employed Capital	$2,572,380

Lease Woodstock Building & Land Only

Leased Value	$2,129,000	
Net Increase in Employed Capital		$443,330

Lease Woodstock Machinery Only

Leased Value	$2,427,653	
Net Increase in Employed Capital		$144,727

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Lease Woodstock Building, Land & Equipment

Leased Value $4,556,653

Net Decrease in Employed Capital ($1,984,273)

Lease Holland Road Building

Leased Value $187,700

This would reduce any of the above alternatives employed capital by $187,700.

Supreme Court, U. S.
FILED
OCT 31 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume IV
Pages 942a to 1266a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1977
CERTIORARI GRANTED MARCH 20, 1978

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EXCERPTS FROM TRANSCRIPTS OF TESTIMONY*

(ALPHABETICAL)

Abrahms, Robert (Glen & Mohawk Milk Association) 496a

Archer, Harry (Borden) 182a

Barnes, Robert (Wallies Market) 414a

Barney, Edward (Model Food Center) 396a

Bartels, Ira (A&P) 293a

Bitting, R. John (FTC) 426a

Cannon, Frank T. (Bowman) 452a

Corbus, William (A&P) 550a

Cox, James (Jim's Grocery) 419a

Dean, Samuel E. (Dean Foods) 447a

Dischner, Eugene (Borden) 540a

* The only changes made in the excerpts of testimony, which appear in this Appendix in chronological order, are those contained in the administrative law judge's "Order Correcting Transcript" dated September 23, 1975.

Chgo & Suburbs

10-26-65

THE BORDEN COMPANY
CENTRAL DIVISION
1821 S. KILBOURN
CHICAGO ILLINOIS 60623

W/E 9 25 1965

RECAP TOTALS

ITEM	PRODUCT		QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	GAL	14512	.6981	10,130.73	
2	HOMO VD MILK	GAL	11671	.7371	8,602.53	
3	HOMO VD MILK	1/2 GAL	81353	.3685	29,978.51	
4	HOMO VD MILK	QTS	38317	.2000	7,663.40	
7	CHOC MILK	QTS	2850	.2437	694.39	
8	CHOC MILK HANDI-PK	1/2 PTS	1328	.0648	86.04	
9	CHOC SHAKE	1/2 PTS	7535	.0930	700.75	
10	CHOC SKIM	1/2 GAL	1296	.2000	447.39	
12	BUTTERMILK	1/2 GAL	4503	.3685	1,659.25	
13	BUTTERMILK	QTS	8185	.2000	1,637.00	
15	GOLDEN DEL-GLASS	GAL	3725	.6500	2,421.25	
16	GOLDEN DEL	1/2 GAL	9428	.3453	3,255.33	
17	FORT SKIM	1/2 GAL	8021	.3453	2,769.54	
18	FORT SKIM	QTS	7641	.1917	1,464.67	
21	WHIPPING CREAM	1/2 PTS	2770	.3068	849.75	
22	HALF&HALF	QTS	922	.5895	543.48	
23	HALF&HALF	PTS	23666	.2984	7,061.82	
24	SOUR CREAM	16-OZ	2624	.4915	1,289.59	
25	SOUR CREAM	8-OZ	5812	.2474	1,437.74	
X26	SOUR CREAM DIPS	8-OZ	1369	.2947	403.39	
X28	ORANGE DRINK	1/2 GAL	243-	.2581	62.72-	
X30	FRUIT PUNCH	1/2 GAL	130-	.2581	33.55-	
X31	LEMONADE	1/2 GAL	58-	.2581	14.96-	
34	SOUR HALF&HALF	PTS	2232	.3574	798.49	
35	TRIPLE WHIP	8-OZ	987	.2038 .4089	403.42	
36	YOGURT	1/2 PTS	2050	.2038	417.71	
46	WAKE UP	PTS	372	.2198	78.31	
47	NUMBER GAL IN		18237	.15	2,735.55	
50	NUMBER GAL OUT		19720-	.15	2,958.00-	
					$ 84,460.80	$ 107,065.93

FEDERAL TRADE COMMISSION
Docket No. 8366 COMMISSION EXHIBIT No. 108-C

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THE BORDEN COMPANY
CENTRAL DIVISION
1821 S. KILBOURN
CHICAGO ILLINOIS 60623

Chicago + Suburbs

RECAP TOTALS

W/E 9 18 1965

ITEM	PRODUCT		QUANTITY	NET PRICE	INVOICE AMT	RETAIL PRICE RETAIL AMT
1	HOMO VD MILK-GLASS	GAL	14664	.6981	10,236.82	.79
2	HOMO VD MILK	GAL	11296	7371	8,326.16	.89
3	HOMO VD MILK	1/2 GAL	79493	3685	29,293.08	.47
4	HOMO VD MILK	QTS	37617	.20	7,523.40	.26
7	CHOC MILK	QTS	2556	.2437	622.71	.33
8	CHOC MILK HANDI-PK	1/2 PTS	1281	.0648	82.97	.0875
9	CHOC SHAKE	1/2 PTS	14547	.08 SPEC	1,163.76	.125
10	CHOC SKIM	1/2 GAL	1227	3453	423.55	.45
12	BUTTERMILK	1/2 GAL	4087	3685	1,505.99	.47
13	BUTTERMILK	QTS	7726	.20	1,545.20	.26
15	GOLDEN DEL-GLASS	GAL	3802	.65	2,471.30	.75
16	GOLDEN DEL	1/2 GAL	9456	3453	3,265.05	.45
17	FORT SKIM	1/2 GAL	7894	3453	2,725.69	45
18	FORT SKIM	QTS	7234	.1917	1,386.55	.25
21	WHIPPING CREAM	1/2 PTS	2850	.3068	874.28	.40
22	HALF&HALF	QTS	904	.5895	532.88	.78
23	HALF&HALF	PTS	23659	.2984	7,059.73	.39
24	SOUR CREAM	16-OZ	2630	4915	1,292.51	.69
25	SOUR CREAM	8-OZ	5773	2474	1,428.11	.39
26	SOUR CREAM DIPS	8-OZ	1330	.2947	391.89	.39
28	ORANGE DRINK	1/2 GAL	5	.2581	1.29	.35
31	LEMONADE	1/2 GAL	3	2581	.78	.35
34	SOUR HALF&HALF	PTS	2360	.3578	844.36	.49
35	TRIPLE WHIP	8-OZ	706	.4089	288.57	.55
36	YOGURT	1/2 PTS	2188	.2038	445.74	.29
46	WAKE UP	PTS	449	.2108	94.52	.29
47	NUMBER GAL IN		18466	.15	2,769.90	
50	NUMBER GAL OUT		19308-	(.15)	2,896.20-	

$ 83,700.59 $ 106,346.17

FEDERAL TRADE COMMISSION
Docket No. 8866 128-H

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THE BORDEN COMPANY
CENTRAL DIVISION
1821 S. KILBOURN
CHICAGO ILLINOIS 60623

CHICAGO + SUBURBS

RECAP TOTALS

W/E 9 11 1965

ITEM	PRODUCT			QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS		GAL	13628	.6981	9,513.59	.7900
2	HOMO VD MILK		GAL	10845	7371	7,993.76	.8900
3	HOMO VD MILK	1/2	GAL	73548	.3685	27,102.31	.4700
4	HOMO VD MILK		QTS	34174	.2000	6,834.80	.2400
7	CHOC MILK		QTS	5301	.2000 SPEC	1,060.20	.3300
8	CHOC MILK HANDI-PK	1/2	PTS	1005	0648	65.11	.0875
9	CHOC SHAKE	1/2	PTS	6664	.093	619.76	.1250
10	CHOC SKIM	1/2	GAL	1112	.3453	383.82	.4500
12	BUTTERMILK	1/2	GAL	4086	3685	1,505.60	.4700
13	BUTTERMILK		QTS	7385	.2000	1,477.00	.2600
15	GOLDEN DEL-GLASS		GAL	3564	.6500	2,316.60	.7500
16	GOLDEN DEL	1/2	GAL	8937	3453	3,085.81	.4500
17	FORT SKIM	1/2	GAL	7299	3453	2,520.22	.4500
18	FORT SKIM		QTS	6997	.1917	1,341.17	.2500
21	WHIPPING CREAM	1/2	PTS	2517	3068	772.12	.4000
22	HALF&HALF		QTS	879	.5895	518.17	.7800
23	HALF&HALF		PTS	22323	2984	6,661.03	.3900
24	SOUR CREAM		16-OZ	2727	.4915	1,340.23	.6900
25	SOUR CREAM		8-OZ	5610	2474	1,387.78	.3900
26	SOUR CREAM DIPS		8-OZ	1275	.2947	375.77	.3900
28	ORANGE DRINK	1/2	GAL	20	.2581	5.16	.3500
30	FRUIT PUNCH	1/2	GAL	6	.2581	1.55	.3500
31	LEMONADE	1/2	GAL	11	.2581	2.83	.3500
34	SOUR HALF&HALF		PTS	2593	3578	927.65	.4900
35	TRIPLE WHIP		8-OZ	621	4089	253.83	.5500
36	YOGURT	1/2	PTS	1909	2038	388.94	.2900
46	WAKE UP		PTS	427	2108	89.89	.2900
47	NUMBER GAL IN			17192	.15	2,578.80	.15
50	NUMBER GAL OUT			18258-	(.15)	2,738.70-	.15
						$ 78,384.80	$ 99,718.29

FEDERAL TRADE COMMISSION
Docket No. 8816 RESPONDENT Exhibit No. 108-I

I

THE BORDEN COMPANY
CENTRAL DIVISION
1821 S. KILBOURN
CHICAGO ILLINOIS 60623

RECAP TOTALS

W/E 9 4 1965

ITEM	PRODUCT			QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS		GAL	15602	.6981	10,891.64	
2	HOMO VD MILK		GAL	12478	.7371	9,197.38	
3	HOMO VD MILK	1/2	GAL	89681	.3685	33,047.42	
4	HOMO VD MILK		QTS	41068	.2000	8,213.60	
7	CHOC MILK		QTS	3111	.2437	757.95	
8	CHOC MILK HANDI-PK	1/2	PTS	1207	.0648	78.20	
9	CHOC SHAKE	1/2	PTS	9153	.0930	851.25	
10	CHOC SKIM	1/2	GAL	1310	.3453	452.25	
12	BUTTERMILK	1/2	GAL	4071	.3685	1,500.03	
13	BUTTERMILK		QTS	8224	.2000	1,644.80	
15	GOLDEN DEL-GLASS		GAL	4088	.6500	2,657.20	
16	GOLDEN DEL	1/2	GAL	10426	.3453	3,599.96	
17	FORT SKIM	1/2	GAL	8355	.3453	2,884.95	
18	FORT SKIM		QTS	7839	.1917	1,502.53	
21	WHIPPING CREAM	1/2	PTS	3144	.3068	964.45	
22	HALF&HALF		QTS	983	.5895	579.48	
23	HALF&HALF		PTS	26925	.2984	8,034.36	
24	SOUR CREAM		16-OZ	3251	.4915	1,597.77	
25	SOUR CREAM		8-OZ	6843	.2474	1,692.83	
26	SOUR CREAM DIPS		8-OZ	1763	.2947	519.51	
28	ORANGE DRINK	1/2	GAL	995	.2191	217.99	
30	FRUIT PUNCH	1/2	GAL	652	.2191	142.86	
31	LEMONADE	1/2	GAL	1012	.2191	221.78	
32	GRAPE	1/2	GAL	249	.2191	54.59	
34	SOUR HALF&HALF		PTS	3150	.3578	1,126.98	
35	TRIPLE WHIP		8-OZ	902	.4089	368.69	
36	YOGURT	1/2	PTS	2197	.2038	447.60	
46	WAKE UP		PTS	623	.2108	131.21	
47	NUMBER GAL IN			19690	.15	2,953.50	
50	NUMBER GAL OUT			19864-	.15	2,979.60-	

$ 93,353.16 $ 118,627.06

Milk

FEDERAL TRADE COMMISSION
Docket No. 8866 Exhibit No. 1081-T

C 1952 6-1-05

THE BORDEN COMPANY

Chicago & Suburbs

CAP TOTALS

W/E 5 29 1965

ITEM	PRODUCT		QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS 79	GAL	14777	6121	10,315.67	
2	HOMO VD MILK 81	GAL	11479	7371	8,461.01	
3	HOMO VD MILK 47	1/2 GAL	80117	3685	29,523.05	
4	HOMO VD MILK 26	QTS	37055	20	7,411.00	
7	CHOC MILK 23	QTS	2603	2437	634.21	
8	CHOC MILK HANDI-PK	1/2 PTS	1936	0648	125.44	
10	CHOC SKIM 45	1/2 GAL	1369	3453	472.60	
12	BUTTERMILK 47	1/2 GAL	4918	3625	1,812.18	
13	BUTTERMILK 26	QTS	8920	20	1,784.00	
15	GOLDEN DEL-GLASS 75	GAL	3944	65	2,563.60	
16	GOLDEN DEL 43	1/2 GAL	9736	3453	3,361.69	
17	FORT SKIN 45	1/2 GAL	8643	3453	2,984.42	
18	FORT SKIN 25	QTS	8215	1917	1,574.65	
21	WHIPPING CREAM 45	1/2 PTS	6260	2706	1,693.84	
22	HALF&HALF 78	QTS	1142	5815	673.17	
23	HALF&HALF 31	PTS	26450	2984	7,892.54	
24	SOUR CREAM 69	16-OZ	3664	4915	1,800.85	
25	SOUR CREAM 39	8-OZ	7915	2474	1,958.01	
26	SOUR CREAM DIPS 21	8-OZ	1695	2947	499.40	
34	SOUR HALF&HALF 41	PTS	3770	3578	1,348.80	
35	TRIPLE WHIP 50	8-OZ	1657	4081	677.42	
36	YOGURT 21	1/2 PTS	2594	2036	528.57	
46	WAKE UP 21	PTS	1013	2108	213.40	
47	NUMBER GAL IN 15		18721	15	2,808.15	
50	NUMBER GAL OUT 15		20309	15	3,046.35	

$ 88,071.32 $ 112,289.56

FEDERAL TRADE COMMISSION
Docket No. 9276 COMPLAINT RESPONDENT Exhibit No. 1058-X

R

Chicago & Suburbs

THE BORDEN COMPANY

RECAP TOTALS

W/E 5 22 1965

ITEM	PRODUCT		QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	GAL	14270		9,961.75	
2	HOMO VD MILK	GAL	10999		8,107.20	
3	HOMO VD MILK	1/2 GAL	76163		28,066.00	
4	HOMO VD MILK	QTS	36317		7,263.40	
7	CHOC MILK	QTS	2458		598.84	
8	CHOC MILK HANDI	1/2 PTS	2035		131.79	
10	CHOC SKIM	1/2 GAL	1341		462.96	
12	BUTTERMILK	1/2 GAL	4908		1,808.52	
13	BUTTERMILK	QTS	8889		1,777.80	
15	GOLDEN DEL-GLASS	GAL	3834		2,524.60	
16	GOLDEN DEL	1/2 GAL	9318		3,217.37	
17	FORT SKIM	1/2 GAL	8439		2,913.93	
18	FORT SKIM	QTS	7648		1,465.92	
21	WHIPPING CREAM	1/2 PTS	4278		1,312.40	
22	HALF&HALF	QTS	1116		657.88	
23	HALF&HALF	PTS	23709		7,074.57	
24	SOUR CREAM	16-OZ	3049		1,498.53	
25	SOUR CREAM	8-OZ	6996		1,730.67	
26	SOUR CREAM DIPS	8-OZ	4094		945.20	
34	SOUR HALF&HALF	PTS	3146		1,125.57	
35	TRIPLE WHIP	8-OZ	1216		497.12	
36	YOGURT	1/2 PTS	2675		545.03	
46	WAKE UP	PTS	835		175.85	
47	NUMBER GAL IN		18156	15	2,723.40	
50	NUMBER GAL OUT		19788	15	2,968.20-	
					$ 83,618.10	$ 106,568.11

APPALACHIAN BRANCH SERVICE OFFICE

C 27414

Chicago Suburbs

THE BORDEN COMPANY

CAP TOTALS

W/E 5 15 1965

ITEM	PRODUCT		QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS		GAL 14320	6981	9,996.62	
2	HOMO VD MILK		GAL 10852	7371	7,998.81	
3	HOMO VD MILK	1/2	GAL 75878	3685	27,960.99	
4	HOMO VD MILK		QTS 36160	20	7,232.00	
7	CHOC MILK		QTS 2593	2437	631.80	
8	CHOC MILK HANDI-PK	1/2	PTS 2080	2408	134.74	
10	CHOC SKIM	1/2	GAL 1327	3453	458.07	
12	BUTTERMILK	1/2	GAL 5245	3685	1,932.68	
13	BUTTERMILK		QTS 9226	20	1,845.20	
15	GOLDEN DEL-GLASS		GAL 3851	65	2,503.15	
16	GOLDEN DEL	1/2	GAL 9350	3453	3,228.45	
17	FORT SKIM	1/2	GAL 8425	3453	2,909.05	
18	FORT SKIM		QTS 7995	1917	1,532.53	
21	WHIPPING CREAM	1/2	PTS 3897	3068	1,195.48	
22	HALF&HALF		QTS 1040	5895	613.04	
23	HALF&HALF		PTS 24014	2980	7,165.66	
24	SOUR CREAM		16-OZ 2983	4915	1,466.09	
25	SOUR CREAM		8-OZ 6463	2474	1,598.81	
26	SOUR CREAM DIPS		8-OZ 1460	2947	430.22	
34	SOUR HALF&HALF		PTS 3046	3578	1,089.73	
35	TRIPLE WHIP		8-OZ 671	4079	274.27	
36	YOGURT	1/2	PTS 2599	2038	529.53	
46	WAKE UP		PTS 708	2108	149.06	
47	NUMBER GAL IN		18170	15	2,725.50	
50	NUMBER GAL OUT		20053-	15	3,007.95-	
					$ 82,593.53	$ 104,841.64

FEDERAL TRADE COMMISSION
Docket No. 8866 Exhibit No. 108-77

Chicago + Suburbs

THE BORDEN COMPANY

RECAP TOTALS

W/E 5 8 1965

ITEM	PRODUCT		QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	GAL	14739	6981	10,289.11	
2	HOMO VD MILK	GAL	11338	7371	8,357.14	
3	HOMO VD MILK	1/2 GAL	78614	3685	28,969.23	
4	HOMO VD MILK	QTS	37454	20	7,490.80	
7	CHOC MILK	QTS	2614	2431	636.86	
8	CHOC MILK HANDI-PK	1/2 PTS	2030	3648	131.48	
10	CHOC SKIM	1/2 GAL	1315	3453	453.96	
12	BUTTERMILK	1/2 GAL	5197	3685	1,915.03	
13	BUTTERMILK	QTS	9504	20	1,900.80	
15	GOLDEN DEL-GLASS	GAL	4096	65	2,662.40	
16	GOLDEN DEL	1/2 GAL	9690	3453	3,345.79	
17	FORT SKIM	1/2 GAL	8847	3453	3,054.76	
18	FORT SKIM	QTS	8574	1917	1,643.41	
21	WHIPPING CREAM	1/2 PTS	4213	3068	1,292.43	
22	HALF&HALF	QTS	1068	5915	629.56	
23	HALF&HALF	PTS	24838	2984	7,411.53	
24	SOUR CREAM	16-OZ	2974	4915	1,461.64	
25	SOUR CREAM	8-OZ	6579	2474	1,627.51	
26	SOUR CREAM DIPS	8-OZ	1479	2947	435.74	
34	SOUR HALF&HALF	PTS	2922	3578	1,045.34	
35	TRIPLE WHIP	8-OZ	2762	3813	1,052.26	
36	YOGURT	1/2 PTS	2700	2031	550.14	
46	WAKE UP	PTS	766	2108	161.35	
47	NUMBER GAL IN		18835	15	2,825.25	
50	NUMBER GAL OUT		19956	15	2,993.40	
					$ 86,350.12	$ 109,711.57

FEDERAL TRADE COMMISSION
Docket No. 8806 COMMISSION RESPONDENT Exhibit No. 12-12

Re: FTC v. A&P and Borden
DOCKET # 8866

COMPARISON OF PRIVATE LABEL PRICES QUOTED A&P TO THE 2-2-2 PRICING FORMULA, 1964-1965

	Dairies Raw Milk Cost	Price Based on 2-2-2 Formula*	Price Quoted A&P	Excess of Quote Over 2-2-2 Formula
Glen & Mohawk Quote for Albany, New York (RAPX 62) (May 1964)				
Quarts	$ .10191	$ .16191	$ .16841	$ .00650
Half-Gallons	.20382	.32382	.33532	.01150
Gallons	.40764	.64764	.66164	.01400
Glen & Mohawk Quote for New York (RAPX 63) (May 1964)				
Quarts	.10191	.16191	.16471	.00280
Half-Gallons	.20382	.32382	.32792	.00410
Gallons	.40764	.64764	.64684	(.00080)
Borden's Quote for New York (Sept. 1964)				
Quarts	.1296	.1896	.1896	-
Half-Gallons	.2592	.3792	.3722	(.0070)
Gallons	.5184	.7584	.7334	(.0250)

*See Tr. 1402-1404 and 6397-6417

6412

RAPX 37A

	Dairies Raw Milk Cost	Price Based on 2-2-2 Formula	Price Quoted A&P	Excess of Quote Over 2-2-2 Formula
Glen & Mohawk Quote for Boston (RAPX 64) (Apr. 1965)				
Quarts	.10815	.16815	.16165	(.00650)
Half-Gallons	.21630	.33630	.33980	.00350
Gallons	.43260	.67260	.67060	(.00200)
Borden's First Quote for Chicago (CX 36) (8/13/65)				
Quarts	.0966	.1566	.1855	.0289
Half-Gallons	.1931	.3131	.3430	.0299
Gallons	.3862	.6262	.6860	.0598
Bowman's Chicago Quote (CX 50) (8/31/65)				
Quarts	.0986	.1586	.1696	.0110
Half-Gallons	.1971	.3171	.3136	(.0035)
Gallons	.3942	.6342	.6272	(.0070)
Final Borden Quote for Chicago (CX 62) (9/21/65)				
Quarts	.0966	.1566	.1705	.0139
Half-Gallons	.1931	.3131	.3110	(.0021)
Gallons	.3862	.6262	.6220	(.0042)

5413

B

RA-Pg 125

BORDEN CUSTOMER WHOLESALE MILKMEN SERVED ON STORE ROUTES	CONTRACT CX 62	TESTIMONY OF STORE OPERATOR	STIPULATION OF 3/1/74*	EXAMINATION OF ROUTE BOOKS FOR NOV.-DEC.'69*	TESTIMONY ROUTE MAN	TYPE OF SERVICE INDICATED LIMITED	TYPE OF SERVICE INDICATED FULL	COMPUTER PROGRAM CONSTANTS DEL/STORE PER NO.	V.MIN. CASE	F.MIN. STOP	COLLECT PER NO.
A&P - 12 Stores	x										
Burger's Food Market-Hammond		x				x		27	K-5	K-9	0
Model Food Center-Hammond		x					x	27	K-6	K-11	0
J. Tittle & Sons-Highland		x					x	27	K-6	K-11	0
J. Tittle & Sons-Lake St.		x					x	27	K-6	K-11	0
J. Tittle & Sons-Village Ct.,Gary		x					x	27	K-6	K-11	0
Wallie's Market-Hammond							x	27	K-6	K-11	0
Wilco Food Center-Gary							x	27	K-6	K-11	0
							x	27	K-5	K-9	0
DeLocks			x								
DeLocks			x				x	27	K-6	K-11	0
DeLocks			x				x	27	K-7	K-11	0
Tiebels Restaurant			x				x	27	K-7	K-11	0
K-Mart			x				x	27	K-7	K-11	0
Stop & Shop			x			x		23	K-5	K-9	0
Bantam			x				x	27	K-7	K-11	0
Hi-Lo			x				x	27	K-6	K-11	27
Stan's Grocery			x				x	27	K-7	K-11	27
Jim's Marathon			x	x			x	14	K-6	K-11	14
							x	14	K-7	K-11	0
SERVES ON MIXED CANTEEN & STORE ROUTE											
A&P #358	x										
DeLocks				x		x		27	K-5		
				x			x	Non-Complaint Customer-No Calculation			
VALPARAISO DISTRIBUTOR											
A&P #341	x										
J. Tittle & Sons-Valparaiso		x			x			Special Program Per Testimony			
					x			Special Program Per Testimony			

* Where both stipulation and route books contributed data, the facts as stated in the stipulation were applied.

p. 11

990a-1

COMPARISON OF BOWMAN (CX 50) AND BORDEN QUOTES (CX 62) (BORDEN ZONE 1)

QTS., 1/2 GALS. & GALS OF HOMOGENIZED MILK	Borden's Quote (CX 62) at $4.32 per Cwt. (1)	Bowman's Quote (CX 50)	Bowman Lower By	IF BOWMAN WERE COMPELLED BY ITS UNION CONTRACT TO MAKE 6 DELIVERIES PER WEEK IN THE GARY-HAMMOND AREA OF INDIANA, BOWMAN STILL LOWER BY (4)
A. IN PAPER CONTAINERS VALUE OF 0.1% B.F.	$2,521,294.96	$2,514,530.13	$ 6,764.83	($ 4,710.52)
COST ADJUSTED TO 3.5% B.F.	25,345.75	--		
	$2,546,640.71	$2,514,530.13	$ 32,110.58	$ 20,635.23
B IN GLASS GALLON CONTAINERS VALUE OF 0.1% B.F. (2)	$ 697,926.87	$ 592,880.88	$105,045.99	$102,874.48
COST ADJUSTED TO 3.5% B.F.	6,242.45	--		
TOTAL COST OF HOMOGENIZED MILK ADJUSTED TO 3.5% B.F.	$ 704,169.32	$ 592,880.88	$111,288.44	$109.116.93
8 OTHER DAIRY ITEMS ON WHICH BORDEN OFFERED PRIVATE LABEL	$3,250,810.03	$3,107.411.01	$143,399.02	$129,752.16
TOTAL 11 ITEMS ON WHICH BORDEN OFFERED PRIVATE LABEL ADJUSTED TO 3.5% B.F. (GLASS GALLONS ARE NOT INCLUDED)	$1,063,967.48	$1,082,157.59	($ 18,190.11)	($ 21,099.43)
10 ADDITIONAL ITEMS OFFERED BY BOWMAN IN PRIVATE OR BOWMAN LABEL AND BY BORDEN IN BORDEN LABEL ONLY	$3,610,608.19	$3,596,687.72	$ 13,920.47	($ 464.20)
TOTAL - 22 FLUID MILK ITEMS	$ 692,850.94 (3)	$ 597,160.62	$ 95,690.32	$ 93,167.85
	$5,007,628.45	$4,786.729.22	$220,899.23	$201,820.58

(1) CX 62 adjusted from $4.29 per cwt. raw milk cost to $4.32, the price in effect as of Sept. 21, 1965

(2) Taken from Borden's September 14, 1965 quote (CX 56C)

(3) Based on Borden's September, 1965 prices to A&P. The ten items are sour cream (pints and 1/2 pints), pints of sour half & half, 1/2 pints of sour cream dip, 8 oz. Yogurt, 1/2 pints of milk shakes, 2% milk (offered by Borden in glass gallons and by Bowman in paper half gallons), half & half (offered by Borden in paper quarts and by Bowman in paper pints), and 2 specialty items offered by Borden (Wake-up and Triple Whip), which are comparable to 3 specialty items offered by Bowman (Boston Blend, Quick-Whip and Reddi-Whip).

(4) Cost for Gary-Hammond area of Indiana computed at Price shown in CX-50 for Areas 1, 2, 3 in Illinois for 6 day per week delivery. The figures in the last column are obtained by subtracting the corresponding "Annual Difference" figures in Column E on RA&PX 247B from the figures in the column entitled "Bowman Lower By" on this page.

Note: All data, except that shown in the extreme right hand column, is taken directly from RA&PX 100.

Detail for Recalculation of Bowman-Borden Quotes if Bowman Was Required To Make 6 Day Delivery In Lake and Porter Counties, Ind.

PRODUCT	A Estimated Annual Vol. In Lake & Porter Co., Ind. (1)	B Bowman Areas 1,2,3 (6 day) (2)	C Price Area 4 (3 day) (3)	D Unit difference (4)	E Annual difference (5)
Borden Private L. Items					
Homo- gal.	129,272	$.6272	$.5984	$.0288	$ 3,723.03
1/2 gal.	493,064	.3136	.2993	.0143	7,050.82
qt.	97,431	.1696	.1624	.0072	701.50
Homo glass gallon	93,198				11,475.35
Sub Total Homo Milk		.5952	.5719	.0233	2,171.51
2% 1/2 gal.	101,781				13,646.86
Fort. Skim 1/2 gal.	21,216	.2944	.2801	.0143	1,455.47
" " qt.	11,371	.3008	.2865	.0143	303.39
Buttermilk 1/2 gal.	23,504	.1632	.1560	.0072	81.87
" qt.	29,276	.3136	.2993	.0143	336.11
Choco. Milk qt.	10,400	.1472	.1400	.0072	210.79
Half & Half qt.	76,076	.2080	.2008	.0072	74.88
Whipping Cream	14,109	.2496	.2441	.0055	418.42
8 other items offered by Borden in Private Label		.2560	.2469	.0091	128.39
Total, 11 Private Label Items					2,909.32
					14,384.67
Sour Cream - pint	16,991	.4054	.3931	.0133	225.98
" " 1/2 pint	36,831	.2080	.2039	.0041	151.01
" 1/2&1/2 pint	32,965	.2976	.2907	.0069	227.46
" Cream dip - 1/2 pt.	10,174	.2800	.2709	.0091	92.58
Yogurt 8 oz.	13,430	.1728	.1637	.0091	122.21
Milk Shake 1/2 pt.	26,860	.0768	.0753	.0015	40.29
2% Milk, Glass gal.	49,448	.5888	.5602	.0286	1,414.21
1/2&1/2 -paper qt.	11,395	.4992	.4882	.0110	125.35
Boston Blend - pt.	7,326	.1856	.1771	.0085	62.27
Quick Whip Dispencer	3,358	.3392	.3301	.0091	30.56
Refi Whip Dispenser	3,357	.4550	.4459	.0091	30.55
Sub Total - 11 items					2.522.47
Total Entire Product Line					19,078.65

Sources:

(1) RA&PX 104, column 4
(2) CX50 G
(3) CX50 J
(4) Column B - Column C
(5) Column A x Column D

RA&PX 246B

938a

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.

ESTABLISHED 1859

EXECUTIVE OFFICES
GRAYBAR BUILDING, 420 LEXINGTON AVENUE
NEW YORK, N.Y. 10017

June 9, 1971

Mr. E. R. Bayma
Purchasing Manager
Chicago

Dear Mr. Bayma:

Following up the telephone conversations on the milk suppliers' proposals, we are forwarding with this letter copy of a suggested letter which you are to send to Borden Dairy & Services Division, Borden, Inc.

When you receive a satisfactory reply and forward to our attention, we shall be in a position to examine the offer.

We also understood from our conversations that the proposal covers a total of 201 stores out of a Divisional total of 260.

You are also at liberty to have the Spinney Run Farms Corporation present a full and complete offering for your consideration, covering the stores which you refer to.

The suggested letter which is attached will have to be amended, of course, as to dates. It is, also, a good idea to use the thoughts expressed in this letter in seeking the complete terms of other suppliers.

Yours very truly,

James J. Ryan

JJR:jc
Att.
cc: Mr. H. B. Smith
Mr. A. C. Malervey - Legal Department

SUGGESTED LETTER

June 7, 1971

Re: Private Label Milk

(date)

We wish to acknowledge your letter and terms of sale annexed.

Before proceeding further we wish the following to be clearly understood,

Any terms of sale you submit must be in writing, set forth complete details of your offer and only the terms precisely so set forth and accepted by this Division are to be deemed the operative terms. Any such terms must be made available to all competing customers of the same grade and quality products in affected markets in order for this Division to accept the offer you tender.

Your terms to this Division will not be acceptable if made in any respect on a "meeting competition" basis.

In this connection we have learned from recent experience (date) that the form of statement set forth in your letter regarding open availability of an offer to all competing customers was not previously intended by your organization to convey such undertaking and it is consequently now regarded by us as totally inadequate. Accordingly, we cannot proceed to consider your offer until this point is completely clarified in writing to our satisfaction.

R 28

Assuming you do so, and assuming further that a specific offer from you is finally determined by us to be acceptable, implementation of the offer by this Division will be on the express condition that satisfactory proof be presented to us that the terms so accepted are in fact being offered to all competing customers before the terms may actually be put into effect in our stores.

Kindly reply by letter. It is our feeling that it would be preferable that henceforth all communications between us relative to your offer be in writing.

Very truly yours,

June 15, 1971

Borden Dairy & Services Division
Northern Division Borden, Inc.
1821 South Kilbourn Avenue
Chicago, Illinois 60623

Attention: Mr. W. C. Kershner
Sales Manager

RE: Private Label Milk

Dear Mr. Kershner:

We wish to acknowledge your letter of April 20, 1971 and terms of sale annexed.

Before proceeding further we wish the following to be clearly understood.

Any terms of sale you submit must be in writing, set forth complete details of your offer and only the terms precisely so set forth and accepted by this Divison are to be deemed the operative terms. Any such terms must be made available to all competing customers of the same grade and quality products in affected markets in order for this Division to accept the offer you tender.

Your terms to this Division will not be acceptable if made in any respect on a "meeting competition" basis.

In this connection we have learned from recent experience that the form of statement set forth in your letter of April 20, 1971 regarding open availability of an offer to all competing customers was not previously intended by your organization to convey such undertaking and it is consequently now regarded by us as totally inadequate. Accordingly, we cannot proceed to consider your offer until this point is completely clarified in writing to our satisfaction.

Assuming you do so, and assuming further that a specific offer from you is finally determined by us to be acceptable, implementation of the offer by this Division will be on the express condition that satisfactory proof be presented to us that the terms so accepted are in fact being offered to all competing customers before the terms may actually be put into effect in our stores.

D 171

Kindly reply by letter. It is our feeling that it would be preferable that henceforth all communications between us relative to your offer be in writing.

Very truly yours,

THE GREAT ATLANTIC & PACIFIC TEA CO., INC.

E. R. Schmidt
Chicago Purchasing

FRS:elp

E 172

1003a

June 24, 1971

Bordon Dairy & Services Division
Northern Division Bordon, Inc.
1821 South Kilbourn Avenue
Chicago, Illinois 60623

Attention: Mr. W. C. Korshner
Sales Manager

Dear Mr. Korshner:

We would like you to enclose with your reply to Mr. Schmidt's letter of June 15, 1971 a cost justification analysis of your milk bid.

Very truly yours,

THE GREAT ATLANTIC & PACIFIC TEA CO., INC.

E. R. Bayma
Purchasing Manager
Chicago Division

ERB:olp

f 163

Form 242 - 3-68
Ptd. in U.S.A.

1004a INTER-COMPANY CORRESPONDENCE

To: Mr. J. J. Ryan
Unit: HEADQUARTERS

From: Mr. E. R. Bayma
Purchasing Manager
Unit: CHICAGO

Date July 2, 1971

Subject:

We are attaching herewith the following correspondence as requested of us in our phone conversation of yesterday.

1. Borden's letter of June 22nd to Elmer Schmidt. This communication increased the April 20th proposal by a .003 per point. This is so stated in paragraph #3.

   It also, of course, affects our current paying price as of July 5.

2. Borden communication dated June 30, 1971 giving us the cost break-down of the .003 increase referred to in their letter of June 22nd.

3. A copy of our letter of June 24th to Borden requesting a cost justification analysis of their proposal to us.

Borden has indicated to us that they are unwilling to submit to us a cost justification analysis on their proposal to us because it is not in accordance with their policy to divulge their costing practices which they consider highly confidential. They indicated that if, however, similar cost justification analysis have been made to us by other dairies in support of their proposals they would be willing to reconsider and would need to know what format such cost justification should take.

E. R. Bayma

ERS:elp
attachments

G 164

Form 2-2 - 3-68
Prtd. in U.S.A.

INTER-COMPANY CORRESPONDENCE

1005a

To: MR. J. J. RYAN
Unit: HEADQUARTERS

From: E. R. BAYMA
Unit: CHICAGO PURCH. MGR.

Date JULY 12, 1971

Subject:

In a phone conversation last week, our Legal Department asked for further clarification, in writing, of our conversation with the Borden Company as stated in our letter of July 2, 1971. We are giving you an additional copy of this letter to forward to them.

Mr. Kershner, Sales Manager, visited our office on Friday morning July 2, 1971 and brought in a cost breakdown dated June 30, 1971. This cost breakdown listed 5 items relative to the cost increase of .00305 per point.

In the conversation it was brought up by Mr. Kershner that Bordens was not willing to submit a cost justification analysis because they would have to disclose confidential costing practices.

He indicated that they had never done this in the past. Mr. Kershner stated this was not an outright "No" and that Bordens would appreciate receiving from us a format for a cost justification analysis.

Mr. Kershner was told that the bids were submitted to Headquarters and that we felt a cost justification analysis was requested in writing and that we should have a reply in writing.

E. R. Bayma

E. R. Bayma

ERS:np

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July 29, 1971

Mr. E. R. Bayma, Purchasing Manager
The Great A & P Tea Company
2622 North Pulaski Road
Chicago, Illinois 60639

Dear Mr. Bayma:

This letter is in response to your letter of June 24, 1971 requesting a cost justification analysis of the milk bid submitted to you on April 20, 1971. A cost justification analysis must of necessity involve the disclosure of confidential data regarding our operation. Regrettably, we must respectfully decline to furnish such information. It has never been our policy to disclose such information to any customer or competitor.

I would like to take this opportunity to reaffirm our desire to render A & P the service outlined in our proposal of April 20, 1971.

Sincerely,

R. C. Wagner
Group Vice President

1007a

RMP 253

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.

ESTABLISHED 1859

EXECUTIVE OFFICES
GRAYBAR BUILDING, 420 LEXINGTON AVENUE
NEW YORK, N.Y. 10017

April 14, 1971

TO: ALL DIVISIONAL PURCHASING MANAGERS

When you obtain offers for private label milk and dairy products in the future will you make sure that the following language is used as part of the request:

> "We wish to emphasize that the Company does not accept offers on the basis of meeting competition except under extraordinary circumstances. Therefore, it is essential that any terms of sale which you may quote will be openly available to all competing customers in the marketing areas described."

H. B. Smith

HBS:DH

cc: Mr. William Corbus
Mr. J. J. Ryan

Woodward & Lothrop

1008a

THE BORDEN COMPANY

July 29, 1969

Mr. A. L. Shough
The Kroger Company
1240 State Avenue
Cincinnati, Ohio 45204

Dear Mr. Shough:

This opportunity to present to you a Kroger-Borden Fluid Milk Program for your Kroger markets in the Chicago Kroger unit is sincerely appreciated.

We are confident that you will find in this presentation, the kind of product program that stimulates and motivates the attainment of increased sales volume and greater profit levels.

The products produced under the Kroger label will be manufactured and processed in accordance with the high quality standards established by Borden. These products, together with the Borden label milk products supplementing the Kroger line, will be processed and packaged in Borden's most modern production plant located at Woodstock, Illinois. This plant, which is the largest fully automated plant in the world handling a full and complete line of fluid milk items places Borden in the enviable position of being able to handle in the most efficient manner, your Chicago unit requirements. Our plant laboratory control program makes certain the pure and wholesome quality of the products produced and the strict adherence to the various local, State and Federal standards.

You will find attached a series of six (6) schedules which set forth the delivered net prices covering Kroger label and Borden label milk products, the terms and conditions in connection with this proposed program, price adjustment factors covering changes in raw milk costs and data in connection with promotional programming. This latter area establishes the proper coordination of merchandising, advertising and selling programs and concepts which are designed to produce the maximum results for Kroger. In this important field as related to fluid milk products, we have the expertise and experience and to this end we will coordinate all of the aspects to make certain that this program involving the sixty-four (64) Kroger stores in your Chicago unit, and Borden's strategically located plants and distribution locations will function smoothly as a unit and that mutually all parties will achieve the optimum possible from this program.

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Certainly not to be overlooked is Borden's advertising program and proven consumer acceptance. Every day we are working, Borden's advertising is also working as a "Silent Salesman" in your stores, helping to create increased consumer interest and impulse sales of dairy products.

We also believe that it is important to give recognition to the location of the various Borden distribution points which provide for greater and more efficient distribution flexibility. In addition to facilities centrally located in Chicago, distribution branches are located at Rockford, Elgin and Libertyville, Illinois and at Hammond and South Bend, Indiana. This complex of locations provide more service flexibility than is obtainable from any other Chicago dealer. Also, our experience in serving your Rockford, Illinois stores with Kroger label products, we believe, is indicative of the job we can do for you on an overall unit basis. In this area sales have shown a significant growth, our standards and product controls have helped to generate satisfactory consumer acceptance of the Kroger label and, modestly, we are proud of our contribution.

A great deal more could be said in regard to our quality, consumer acceptance, merchandising, experience and personnel know-how, which would contribute to a successful Kroger-Borden Fluid Milk Program. However, we are sure that you are quite familiar with these plus factors.

We are grateful for your time and consideration of our proposal and request to become a part of your Kroger program. Please rest assured that your confidence in us will be returned many, many times by our people through their work, efforts, enthusiasm and cooperation.

Sincerely,

BORDEN, INC.
Chicago Region

Orville P. Gose
General Manager

OPG/vw
Encls.

Schedule No. 1

BORDEN, INC.
Chicago Region

VENDOR DELIVERED STORE WITHDRAWAL MILK PRICE SCHEDULE
FIVE (5) DAY PER WEEK DROP DELIVERY PROGRAM
FROZEN FOOD PRODUCTS
CHICAGO AREA (excluding Rockford and Freeport, Illinois)

Point Value	Product	Size and Type	Net Price
4	Homo V.D. Milk	Gallon - Paper	$.7656
2	Homo V.D. Milk	1/2 Gallon-Paper	.3828
1	Homo V.D. Milk	Quart - Paper	.2064
4	2%	Gallon - Paper	.7236
2	2%	1/2 Gallon-Paper	.3618
1	Chocolate Milk	Quart - Paper	.2408
2	Fortified Skim	1/2 Gallon - Paper	.3302
1	Fortified Skim	Quart - Paper	.1697
1	Buttermilk	Quart - Paper	.1734
2	Sour Cream	16 oz. Carton	.3784
1	Sour Cream	8 oz. Carton	.2038
1	Half & Half	Pint - Paper	.2289
1	Whipping Cream	1/2 Pint-Paper	.2292
1/2	Cottage Cheese	8 oz. Carton	.1720
1	Cottage Cheese	16 oz. Carton	.2691
2	Cottage Cheese	32 oz. Carton	.5124
1	Flavored Cottage Cheese	16 oz. Carton	.3012

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Point Value	Product	Size and Type	Net Price
4	Homo V.D. Milk	Gallon-Paper	$ .7750
4	Homo V.D. Milk	Gallon-Glass	.7440
2	Homo V.D. Milk	1/2 Gallon-Paper	.3895
1	Homo V.D. Milk	Quart-Paper	.2099
4	2%	Gallon-Paper	.7370
2	2%	1/2 Gallon-Paper	.3685
1	Chocolate Milk	Quart-Paper	.2441
1/2	Chocolate Shake	1/2 Pint-Paper	.1089
2	Chocolate Skim	1/2 Gallon-Paper	.3697
2	Fortified Skim	1/2 Gallon-Paper	.3369
1	Fortified Skim	Quart-Paper	.1730
2	Buttermilk	1/2 Gallon-Paper	.3466
1	Buttermilk	Quart-Paper	.1767
2	Sour Cream	16 oz. Carton	.3851
1	Sour Cream	8 oz. Carton	.2072
1	Sour Half & Half	Pint-Paper	.3400
2	Half & Half	Quart-Paper	.4557
1	Half & Half	Pint-Paper	.2323
1	Whipping Cream	1/2 Pint-Paper	.2326
1/2	Cottage Cheese	8 oz. Carton	.1754
1	Cottage Cheese	16 oz. Carton	.2725
2	Cottage Cheese	32 oz. Carton	.5191
1	Flavored Cottage Cheese	16 oz. Carton	.3045
1	Dry Cheese	12 oz. Carton	.3371
1	Sour Cream Dips	8 oz. Carton	.2069
1	Yogurt	8 oz. Carton	.2170

Schedule No. 3

BORDEN, INC.
Chicago Region
VENDOR DELIVERED GROCERY PRODUCTS PRICE SCHEDULE
THESE (3) DAY TRADER GROCERY PRODUCTS
ROCKFORD & FREEPORT, ILLINOIS

Point Value	Product	Size & Type	Net Price Kroger Label	Net Price Borden Label
4	Homo V.D. Milk	Gallon-Paper	$.7325	$.7325
4	Homo V.D. Milk	Gallon-Glass	-	.6825
2	Homo V.D. Milk	1/2 Gallon-Paper	.3675	.3675
1	Homo V.D. Milk	Quart-Paper	.1875	.1875
4	2%	Gallon-Paper	-	.7009
2	2%	1/2 Gallon-Paper	.3441	.3441
1	Chocolate Milk	Quart-Paper	.2213	.2213
1/2	Chocolate Shake	1/2 Pint-Paper	-	.1030
2	Chocolate Skim	Half Gal.-Paper	-	.3160
2	Fortified Skim	1/2 Gallon-Paper	.2596	.2596
1	Fortified Skim	Quart-Paper	-	.1350
2	Buttermilk	1/2 Gallon-Paper	-	.4150
1	Buttermilk	Quart-Paper	.2225	.2225
2	Sour Cream	16 oz. Carton	.4900	.4900
1	Sour Cream	8 oz. Carton	.2550	.2550
1	Sour Half & Half	Pint-Paper	-	.3710
2	Half & Half	Quart-Paper	-	.4400
1	Half & Half	Pint-Paper	.2200	.2200
1	Whipping Cream	1/2 Pint-Paper	.2550	.2550
1/2	Cottage Cheese	8 oz. Carton	.1670	.1670
1	Cottage Cheese	16 oz. Carton	.2730	.2730
2	Cottage Cheese	32 oz. Carton	.5460	.5460
1	Flavored Cottage Cheese	16 oz. Carton	.2930	.2930
1	Dry Cheese	12 oz. Carton	-	.2730
1	Sour Cream Dips	8 oz. Carton	-	.3000
1	Yogert	8 oz. Carton	-	.1925

TERMS AND CONDITIONS

The unit selling prices shown on Milk Price Schedules No. 1, 2 and 3 relate to Kroger and Borden label products delivered to your stores in accordance with the prevailing delivery methods applicable and subject to terms as herein set forth.

(a) The unit selling prices for Class I products as set forth on Milk Price Schedules No. 1, 2 and 3 are based on the July 1968 net Class I superpool price of $5.66 per cwt. for 3.5% butterfat milk, which net Class I superpool price recognizes the negotiated Class I superpool price of $5.70 per cwt. less the zone allowance credit of $.04 per cwt. under the superpool program. The unit selling prices for Class II products such as cottage cheese are based on the Class II buying price of $4.18 per cwt. for 3.5% butterfat milk.

(b) The unit selling prices as set forth on Schedules No. 1, 2 and 3 will be subject monthly to automatic adjustment up or down in accordance with the changes occurring in the Class I and Class II announced milk prices under the Federal Order program or a negotiated Class I milk price in accordance with cost change factors set forth on Schedule No. 5.

(c) In the event the Class I milk price established under the provisions of the Federal Order in effect or a negotiated Class I milk price establishes a change in the presently recognized butterfat and skim milk values, the effect of such change will be automatically reflected where applicable in the unit prices as set forth on Schedules No. 1, 2 and 3.

(d) Deliveries will be made in accordance with the prevailing drop-delivery service in effect in the various markets.
   (1) Stores served on a 3-day per week basis will receive one delivery on Monday-Wednesday-Friday or Tuesday-Thursday-Saturday.
   (2) Stores served on a 5 or 6-day per week basis will receive one delivery per day.
   (3) The delivery time to each store will be handled in a manner to effectuate the most efficient delivery schedule.
   (4) Special deliveries shall not be made except in unusual instances, such as failure to perform in accordance with the advance order.
   (5) Deliveries at the store level will be made as directed, which considers the following drop-delivery considerations:

TERMS AND CONDITIONS (Cont'd.)

(a) To the receiving door of the store.
(b) To a designated place on the receiving platform.
(c) To a refrigerated storage box that can be entered directly from a platform or ground level location and into which dairy products can be conveniently stocked.

(6) Empty milk cases and glass bottles shall be placed at a designated point for easy accessibility and pick-up by the delivery man.

(e) Ordering of products.

(1) Products will be pre-ordered, and advance order tickets for the following delivery shall be completed for presentation to the delivery man at the time of each delivery.

(2) Advance order forms and delivery tickets will be supplied by Borden.

(3) Borden personnel will assist in the formulation of this program and will work with Kroger personnel during the introductory period in the various phases of ordering and rotation of merchandise so that the program will achieve its ultimate sales goals and expectations.

(f) Code dates.

(1) Products will be clearly coded on the gable of the milk items and on the bottom of all bucket products.

(2) All products are coded with an expiration date.

(3) Code date requirements and expirations will be explained in the Chicago unit office and at local levels as requested.

(g) Credit for product returns.

(1) Credit for product returns shall only consider faulty containers at the time of delivery and faulty products remaining within the code dates.

(h) In-Store Merchandising.

(1) Borden's quarterly schedule of milk promotions will be made available.

(2) Point-of-sale media will be furnished on approval at your office.

(3) Program outline is set forth in detail under Schedule No. 6.

TERMS AND CONDITIONS (Cont'd.)

(i) Containers.

The unit selling prices shown on Milk Price Schedules No. 1, 2 and 3 are related to Borden's present unit purchase cost of such containers. Any changes in the purchase cost of such containers will be automatically reflected in the unit selling prices.

(j) Changes occurring in the cost of labor as a result of union contract changes, changes in the cost of materials and supplies and other applicable costs will be considered as the basis for an adjustment, up or down, to the unit selling prices set forth on Milk Price Schedules No. 1, 2 and 3.

(k) Invoices covering products purchased will be made on a weekly basis with payment due within ten (10) days from billing date.

(l) This program and the unit prices set forth on Milk Price Schedules No. 1, 2 and 3 is geared to serving the Kroger Chicago unit stores with their full requirements of fluid milk products packaged under Kroger and Borden labels.

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Schedule Exc. 5

BORDEN, INC.
Chicago Region
PRICE ADJUSTMENT SCHEDULE
COVERING RAW MILK COST CHANGES

Class I Milk Products

If Class I Milk Cost Increases or Decreases Per Cwt.	Selling Prices Will Increase or Decrease Per Point	If Class I Milk Increases or Decreases Per Cwt.	Selling Prices Will Increase or Decrease Per Point
$ .01	$ .0002	$ .24	$ .0052
.02	.0004	.25	.0054
.03	.0007	.26	.0056
.04	.0009	.27	.0059
.05	.0010	.28	.0061
.06	.0013	.29	.0063
.07	.0015	.30	.0065
.08	.0017	.31	.0067
.09	.0019	.32	.0069
.10	.0021	.33	.0072
.11	.0024	.34	.0074
.12	.0026	.35	.0076
.13	.0028	.36	.0078
.14	.0030	.37	.0080
.15	.0033	.38	.0082
.16	.0035	.39	.0085
.17	.0037	.40	.0087
.18	.0039	.41	.0089
.19	.0041	.42	.0091
.20	.0043	.43	.0093
.21	.0045	.44	.0095
.22	.0048	.45	.0098
.23	.0050	.46	.0100

Class II Cottage Cheese

If Class II Milk Cost Increases or Decreases Per Cwt.	Selling Prices Will Increase or Decrease Per Pound
$ .01	$ .0005

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Schedule No. 6

BORDEN, INC.
Chicago Region
SCHEDULE OF MILK PROMOTIONS
3RD QUARTER 1968

Period	Item	Net In	Sugg. O/S
July 1 - 6	Quarts Buttermilk	$ .16	$ .19
	Half-Gallon Buttermilk	.32	.38
July 8 - 13	Elsie Shakes	.089	3/31
July 15 - 20	1 Lb. Cottage Cheese	.26	.33
July 22 - 27	Pints Half & Half	.24	.29
July 29-Aug. 3	Quarts Buttermilk	.16	.19
	Half-Gallon Buttermilk	.32	.38
Aug. 5 - 10	Yogurt	.181	.22
Aug. 12 - 17	Quarts Buttermilk	.16	.19
	Half-Gallon Buttermilk	.32	.38
Aug. 19 - 24	2 Lb. Cottage Cheese	.50	.69
Aug. 26 - 31	Pints Half & Half	.24	.29
Sept. 2 - 7	Half-Gallon Chocolate Drink	.32	.39
Sept. 9 - 14	Pints Coffee Whitener	.145	.19
Sept. 16 - 21	1 Lb. Cottage Cheese	.26	.33
Sept. 23 - 28	Half-Pints Whipping Cream	.24	.29
Sept. 30 - Oct. 5	Pints Half & Half	.24	.29

The above schedule is our third quarter promotional program. We will submit a quarterly program to your Chicago Unit Office for their approval covering each quarter.

1018a

THE BORDEN COMPANY
CHICAGO REGION
1821 S. KILBOURN AVENUE
CHICAGO, ILLINOIS 60623

AREA CODE 312 277-6400

September 12, 1968

Mr. William H. Dyer, Jr., President
Lucky Stores, Inc.
1701 Marina Blvd.
San Leandro, California 94577

Mr. Robert Margulies, President
Eagle Food Centers, Inc.
Route 67 and Knoxville Road
Milan, Illinois 47031

Gentlemen:

We sincerely appreciate this opportunity to present our overall Food Club (or Lady Lee)/Borden Dairy products program for your Eagle Food Centers.

In the pages that follow we have outlined our complete sales programs and appreciate this opportunity to carefully review them with you. We feel quite certain you will be pleased with the tremendous savings available to your stores with your acceptance of this program.

In the proposal that follows, we have quoted prices for your label involving homogenized milk (gallons and half-gallons), 2% Low Fat Milk (gallons and half-gallons), Fortified Skim (half-gallons), Half & Half (pints), and Cottage Cheese (1 Lb.). We feel these items cover the tonnage products and are in keeping with your existing program.

We have designated Ralph Winters, General Sales Manager at our Rock Island, Illinois plant as your immediate sales and warehouse contact. Ralph will work closely with the writer in coordinating your dairy products program over your three (3) state operating area.

We could go into great detail regarding quality, consumer acceptance, production know-how, service, advertising, and product superiority, but, for the sake of brevity, we will not attempt to present the many Borden "plusses" which we feel would accrue to your fine stores. Let us say, however, that Borden milk products are well known and do enjoy outstanding consumer acceptance throughout the Midwest. We completely blanket your entire serving area with a network of strategically located Borden plants.

We wish to advise that our prices as proposed to you are proper under applicable law and will be available to all customers in the same class.

We thank you again, Bill and Bob, for the opportunity to present our

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proposal. Your business would naturally mean a great deal to us. Rest assured, your confidence will be returned many, many times by our people through their work, enthusiasm, and complete cooperation.

Sincerely,

William K. Schools
Vice President - Sales

WKS/vw
Attachments

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B

GENERAL TERMS AND CONDITIONS
APPLICABLE TO ALL OF THE
FOLLOWING PRICE SCHEDULES

TERMS AND CONDITIONS

The unit prices shown on the attached price schedules relate to Food Club and Borden Label products and are subject to terms and conditions as herein set forth.

(A) The unit selling prices for Class I and Class II products as set forth on our price schedules are based on the July, 1968 net Class I prices as follows:

Woodstock, Illinois (Chicago Federal Order) $5.70 Class I Super Pool Prices Per Cwt.

Class I Total	.065 Per Cwt. Fees & Premiums $ 5.765 Per Cwt. for 3.5% Milk
	$ 4.18 Class II Cost per Cwt.
Class II Total	.05 Per Cwt. Fees & Premiums $ 4.23 Per Cwt. for 3.5% Milk

Pekin, Illinois (Pekin Federal Order) $ 5.72 Class I Super Pool Prices Per Cwt.

Class I Total	.08 Per Cwt. Fees & Premiums $ 5.80 Per Cwt. for 3.5% Milk
	$ 4.28 Class II Cost per Cwt.
Class II Total	.12 Per Cwt. Fees & Premiums $ 4.40 Per Cwt. for 3.5% Milk

Rock Island, Illinois (Rock Island Federal Order) $ 5.63 Class I Super Pool Prices Per Cwt.

Class I Total	.13 Per Cwt. Fees & Premiums $ 5.76 Per Cwt. for 3.5% Milk
	$ 4.28 Class II Cost Per Cwt.
Class II Total	.12 Per Cwt. Fees & Premiums $ 4.40 Per Cwt. for 3.5% Milk

The unit selling prices set forth on our price schedules will be subject monthly to automatic adjustments up or down in accordance with the changes occurring in the Class I and Class II announced milk prices under the Federal Order Program or, a negotiated Class I Super Pool Price, in accordance with cost change factors set forth on our Price Adjustment Schedule.

(B) In the event the Class I milk price established under the provisions of the Federal Order in effect or a negotiated Class I milk price establishes a change in the presently recognized butterfat and skim milk values, the

effect of such change will be automatically reflected where applicable in the unit prices as set forth on our dock pick-up price schedule.

(C) Ordering of Products.

(1) Products will be pre-ordered at least two (2) days prior to the dock pick up date or delivery date where products are delivered by Borden.

(2) Borden personnel will assist in the formulation of this program and will work with Eagle personnel during the introductory period in the various phases of ordering and scheduling.

(D) The date and time of dock pick-up at Borden's docks must be established in advance to provide the most efficient material handling program for Borden and its customers. Where Borden delivers from its routes, the cooperation of store personnel is necessary to conserve driver and truck time.

(E) Code Dates.

(1) Products will be clearly coded on the gable of the milk items and on bottom of all bucket products.

(2) All products are coded with an expiration date.

(3) Code date requirements and expirations will be explained at local levels as requested.

(F) Credit for Product Returns.

(1) Credit for product returns shall only consider faulty containers at the time of dock delivery or at the time of delivery where deliveries are made by Borden route vehicles.

(G) Under this program private label purchases do not include the performance of advertising, store promotions, in-store material, product promotions, etc. on the part of Borden.

(H) Containers.

The unit selling prices shown on all price schedules are related to Borden's present unit purchase cost of containers. Any changes in the purchase

TERMS AND CONDITIONS (CONTINUED)

cost of containers will be automatically reflected in the unit selling prices.

(I) Changes occurring in the cost of labor as a result of union contract changes, changes in the cost of materials and supplies and other applicable costs will be considered as the basis for an adjustment, up or down, to the unit selling prices set forth on all price schedules attached hereto.

(J) Invoices covering products purchased will be made on a weekly basis with payment due within ten (10) days from billing date.

98%

BORDEN, INC.

PRICE ADJUSTMENT SCHEDULE

COVERING RAW MILK COST CHANGES

Class I Milk Products

If Class I Milk Cost Increases or Decreases Per Cwt.	Selling Prices Will Increase or Decrease Per Point	If Class I Milk Increases or Decreased Per Cwt.	Selling Prices Will Increase or Decrease Per Poi
$ .01	$ .0002	$ .24	$ .0052
.02	.0004	.25	.0054
.03	.0007	.26	.0056
.04	.0009	.27	.0059
.05	.0010	.28	.0061
.06	.0013	.29	.0063
.07	.0015	.30	.0065
.08	.0017	.31	.0067
.09	.0019	.32	.0069
.10	.0021	.33	.0072
.11	.0024	.34	.0074
.12	.0026	.35	.0076
.13	.0028	.36	.0078
.14	.0030	.37	.0080
.15	.0033	.38	.0082
.16	.0035	.39	.0085
.17	.0037	.40	.0087
.18	.0039	.41	.0089
.19	.0041	.42	.0091
.20	.0043	.43	.0093
.21	.0045	.44	.0095
.22	.0048	.45	.0098
.23	.0050	.46	.0100

Class II Cottage Cheese

If Class II Milk Cost Increases or Decreases Per Cwt.	Selling Prices Will Increase or Decrease Per Pound
$ .01	$ .0005

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BORDEN DOCK PICK-UP PRICES

THE SELLING PRICES SET FORTH ON THE FOLLOWING DOCK PICK-UP PRICE SCHEDULES ARE EFFECTIVE WHERE PRODUCTS ARE PICKED UP IN TRAILER LOADS F.O.B. BORDEN'S DOCKS LOCATED AT WOODSTOCK, PEKIN AND ROCK ISLAND, ILLINOIS, SUBJECT TO THE TERMS AND CONDITIONS AS SET FORTH

990

9/12/63

BORDEN DOCK PICK-UP PRICES *

Product	Size	Point Value	Woodstock, Ill. Dock Pick-Up Prices	Pekin, Ill. Dock Pick-Up Prices	Rock Island, Ill. Dock Pick-Up Prices
Food Club					
Homo Milk 3.3% B. F.	Gallon	4	.6464 +.0060	.6496	.6464
Homo Milk 3.3% B. F.	1/2Gal.	2	.3222	.3238	.3222
2%	Gallon	4	.5964	.5996	.5964
2%	1/2 Gal.	2	.2972	.2988	.2972
Fortified Skim	1/2 Gal.	2	.2483	.2499	.2483
Half & Half	Pint	1	.1847	.1851	.1847
Cottage Cheese	Lb.	1	.2204	.2289	.2289
" "	2#	2	.4152	.4324	.4324
Borden Label					
[illegible]			.1716	.1716	.1716
Homo Milk-Glass 3.3%B. F.	Gallon	4	.6365	.6397	.6365
Homo Milk-Paper 3.3%B. F.	Gallon	4	.6564 +.0060	.6596	.6564
Homo Milk 3.3%B. F.	1/2 Gal.	2	.3272	.3288	.3272
Homo Milk 3.3%B. F.	Quart	1	.1752	.1760	.1752
2%	Gallon	4	.6064	.6096	.6064
2%	1/2 Gal.	2	.3022	.3038	.3022
Chocolate Milk	Quart	1	.2037	.2045	.2037
Chocolate Skim	1/2 Gal.	2	.2882	.2898	.2882
Fortified Skim	1/2 Gal.	2	.2533	.2549	.2533
Fortified Skim	Quart	1	.1326	.1334	.1326
Buttermilk	1/2 Gal.	2	.2667	.2683	.2667
Buttermilk	Quart	1	.1363	.1371	.1363
Half & Half	Quart	2	.3657	.3665	.3657
Half & Half	Pint	1	.1872	.1876	.1872
Whipping Cream	1/2 Pint	1	.1961	.1963	.1961
Sour Cream	16 oz.	2	.3095	.3099	.3095
Sour Cream	8 oz.	1	.1693	.1695	.1693
Sour Half & Half	16 oz.	1	.2406	.2414	.2406
Sour Cream Dip	8 oz.	1	.1691	.1693	.1691
Cottage Cheese	8 oz.	1/2	.1267	.1310	.1310
Cottage Cheese	Lb.	1	.2229	.2314	.2314
Cottage Cheese	2 Lb.	2	.4204	.4374	.4374
Cottage Cheese-Flav.	Lb.	1	.2568 .2479	.2653 .2564	.2653 .2564
Dry Curd Cheese	12 oz.	1	.2683 .2313	.2747 .2377	.2747 .2377
[illegible]	8	1	.3165 .2616	.3157 .2641	.3157 .2641

* The above prices are net and subject to no further discounts. These prices are subject to the attached terms and conditions.

.1317 .1647 .1317 .1647 991

BORDEN DROP DELIVERY PRICE SCHEDULES

(1) ROCKFORD, LIBERTYVILLE, & ELGIN AREAS

(2) ROCK ISLAND, MOLINE, EAST MOLINE, KEWANEE, STERLING AND ROCK FALLS, ILLINOIS AREAS

1028a

BORDEN DROP DELIVERY PRICES *

ROCKFORD, LIBERTYVILLE AND ELGIN AREAS

Product	Size	Point Value	Rockford Area (1) (3 Day Drop) Present Prices	Libertyville and Elgin Area (2) (5 Day Drop) Present Prices
Food Club				
Homo Milk 3.3%B.F.	Gallon	4	.7160	.7560
Homo Milk 3.3%B.F.	1/2 Gal.	2	.3580	.3780
2%	Gallon	4	.6740	.7140
2%	1/2 Gal.	2	.3370	.3570
Fortified Skim	1/2 Gal.	2	.3054	.3254
Half & Half	Pint	1	.2165	.2265
Cottage Cheese	Lb.	1	.2591	.2691
" "	2#	2	.4924	.5124
Borden Label				
Homo Milk-Glass 3.3%B.F.	Gallon	4	.6944	.7344
Homo Milk-Paper 3.3%B.F.	Gallon	4	.7260	.7660
Homo Milk 3.3%B.F	1/2 Gal.	2	.3630	.3830
Homo Milk 3.3%B.F.	Quart	1	.1965	.2065
2%	Gallon	4	.6840	.7240
2%	1/2 Gal.	2	.3420	.3620
Chocolate Milk	Quart	1	.2331	.2531
Chocolate Skim	1/2 Gal.	2	.3449	.3649
Fortified Skim	1/2 Gal.	2	.3104	.3304
Fortified Skim	Quart	1	.1598	.1698
Buttermilk	1/2 Gal.	2	.3212	.3412
Buttermilk	Quart	1	.1635	.1735
Half & Half	Quart	2	.4309	.4509
Half & Half	Pint	1	.2190	.2290
Whipping Cream	1/2 Pint	1	.2193	.2293
Sour Cream	16 oz.	2	.3586	.3786
Sour Cream	8 oz.	1	.1939	.2039
Sour Half & Half	16 oz.	1	.3276	.3376
Sour Cream Dip	8 oz.	1	.1968	.2068
Cottage Cheese	8 oz.	1/2	.1695	.1745
Cottage Cheese	Lb.	1	.2616	.2716
Cottage Cheese	2 Lb.	2	.4974	.5174
Cottage Cheese-Flav.	Lb.	1	.2937	.3037
Dry Curd Cheese	12 oz.	1	.3271	.3371
" "	8 oz.	1	.3677	.3877

* The above prices are net and subject to no further discounts. These prices are subject to the terms and conditions as set forth.

Applicable to stores located in:

(1) Rockford, Belvidere, Freeport, Oregon, DeKalb, Rochelle, Dixon.

(2) Woodstock, Mundelein, Waukegan, Lindenhurst, Round Lake, Elgin, Carpentersville, St. Charles, Aurora, Crystal Lake, McHenry.

Borden Delivered Prices

Rockford, Libertyville and Elgin Areas

The selling prices set forth represent delivered prices based on delivery to Eagle Food Center Stores in the above described areas by Borden routes and considers the following:

(a) Delivery days per store are stipulated by the Union contracts in effect.
  (1) Rockford - 3 Day Service is allowed.
  (2) Libertyville and Elgin - 5 Day Service is mandatory.

(b) Contract wage rates must be paid as negotiated
  (1) Rockford - Hourly Rate.
  (2) Libertyville and Elgin - Weekly Base Wage and Commission.

(c) Union contract restrictions prohibits the removal of store business from the routes for delivery or pick-up by others.

(d) Basic delivery methods reflect advanced pre-ordering by stores commensurate with the stipulated delivery frequency. All routes in these three areas are capable of maximum efficiencies from routes operated by Borden.

(e) No special deliveries.

(f) Area Involved: All stores within the boundaries of the following area:

North: Wisconsin-Illinois State Line.
East: Lake Michigan.
South: U. S. Route #30.
West: Illinois Route #26.

(g) Stores Included:

Rockford - 17

#1 [illegible] #13 [illegible] #35 [illegible]
#2 " #15 " #37 [illegible]
#3 " #19 [illegible] #44 Rock
#6 " #21 " #224 [illegible]
#10 " #27 [illegible] #225 [illegible]
#12 #32 [illegible]

Libertyville - 5

#10 [illegible]
#24 [illegible]
#25 [illegible]
#29 [illegible]
#30 [illegible]

Elgin - 9

#4 #222 [illegible]
#7 [illegible] #223 [illegible]
#9 [illegible] #232 [illegible]
#17 [illegible]
#28 [illegible]
#36 [illegible]

BORDEN DROP DELIVERY PRICES *

THREE (3) DAY DROP

ROCK ISLAND, MOLINE, EAST MOLINE, KEWANEE STERLING AND ROCK FALLS, ILLINOIS AREA

Product		Size	Point Value	3 Day Drop Prices (1)	Present Prices
Food Club					
Homo Milk	3.3% B.F.	Gallon	4	.7044	.7566
Homo Milk	3.3% B.F.	1/2 Gal.	2	.3522	.3783
2%		Gallon	4	.6624	.6984
2%		1/2 Gal.	2	.3312	.3492
Fortified Skim		1/2 Gal.	2	.2996	.3379
Half & Half		Pint	1	.2136	.2780
Cottage Cheese		Lb.	1	.2439	.2407
" "		2#	2	.4624	
Borden Label					
Homo Milk-Glass	3.3% B.F.	Gallon	4	.6828	.7343
Homo Milk-Paper	3.3% B.F.	Gallon	4	.7144	.7766
Homo Milk	3.3% B.F.	1/2 Gal.	2	.3572	.3883
Homo Milk	3.3% B.F.	Quart	1	.1936	.2125
2%		Gallon	4	.6724	.7184
2%		1/2 Gal.	2	.3362	.3592
Chocolate Milk		Quart	1	.2302	.2350
Chocolate Skim		1/2 Gal.	2	.3391	-
Fortified Skim		1/2 Gal.	2	.3046	.3479
Fortified Skim		Quart	1	.1569	.1974
Buttermilk		1/2 Gal.	2	.3154	-
Buttermilk		Quart	1	.1606	.2125
Half & Half		Quart	2	.4251	-
Half & Half		Pint	1	.2161	.2830
Whipping Cream		1/2 Pint	1	.2164	.3131
Sour Cream		16 oz.	2	.3528	.4002
Sour Cream		8 oz.	1	.1910	.2463
Sour Half & Half		16 oz.	1	.3247	-
Sour Cream Dip		8 oz.	1	.1939	.2905
Cottage Cheese		8 oz.	1/2	.1385	.1488
Cottage Cheese		Lb.	1	.2464	.2457
Cottage Cheese		2 Lb.	2	.4674	.4322
Cottage Cheese-Flav.		Lb.	1	.2803	.2608
Dry Curd Cheese		12 oz.	1	.2897	.1926

* The above prices are net and subject to no further discounts. These prices are subject to the terms and conditions as set forth.

BORDEN DELIVERED PRICES

ROCK ISLAND, MOLINE, EAST MOLINE, KEWANEE, STERLING AND ROCK FALLS, ILLINOIS AREAS

The selling prices set forth represent delivered prices based on delivery to Eagle Food Center stores in the above described areas by Borden routes and considers the following:

(a) Delivery days per store considers that maximum efficiency is to be maintained by utilizing advanced pre-order of store sales needs, a three day delivery frequency and the use of tractor-trailer delivery vehicles wherever possible.

(b) Contract wage rates must be paid as negotiated.

Rock Island - Hourly Rate

(c) Union contract restrictions prohibit the removal of store business from the routes for delivery or pick-up by others.

(d) Area Involved: All stores within the boundaries of the following area:

North:	U. S. Route No. 30
East:	Illinois Route No. 88
South:	Illinois Route No. 17
West:	Mississippi River

(e) Stores Included:

#11	#118	#228
#13	#119	
#102	#120	
#112	#133	
#113	#141	
#114	#155	

SCHEDULES SHOWING DOCK PRICES AND
ESTIMATED STORE DELIVERED COSTS USING EAGLE
EMPLOYED CONTRACT CARRIER OR EAGLE'S OWN
TRANSPORT EQUIPMENT

(1) PLANO, JOLIET, MORRIS, PERU, AND PRINCETON AREAS
(2) McCOMB, ILLINOIS AND BURLINGTON, IOWA AREAS
(3) DAVENPORT, BETTENDORF, CLINTON, IOWA CITY, CEDAR RAPIDS, DUBUQUE, MARSHALLTOWN, CEDAR FALLS AND WATERLOO, IOWA AREAS
(4) MADISON, MIDDLETON, STOUGHTON, FT. ATKINSON, MONROE, WHITEWATER, JANESVILLE AND BELOIT, WISCONSIN AREAS

9/12/68

SCHEDULE SHOWING DOCK PRICES (F.O.B. WOODSTOCK, ILL.)
AND
ESTIMATED STORE DELIVERED COSTS
USING EAGLE EMPLOYED CONTRACT CARRIER
OR EAGLE'S OWN TRANSPORT EQUIPMENT

Product	Size	Point Value	Dock Price F.O.B. Woodstock	Est. Store Delivered Cost (1)	Present Prices (Plano, Ill.)
Food Club					
Homo Milk 3.3% B.F.	Gallon	4	$ .6464 .6600	$ .6900	$ .7632
Homo Milk 3.3% B.F.	1/2 Gal.	2	.3222	.3440	.3816
2%	Gallon	4	.5964	.6400	.7212
2%	1/2 Gal.	2	.2972	.3190	.3606
Fortified Skim	1/2 Gal.	2	.2453	.2701	.3606
Half & Half	Pint	1	.1847	.1956	.2923
Cottage Cheese	Lb.	1	.2204	.2313	.2725
"	2#	2	.415#	.437	
Borden Label					
Homo Milk-Glass 3.3% B.F.	Gallon	4	.6365 .6600	.6801	.7482
Homo Milk-Paper 3.3% B.F.	Gallon	4	.6564	.7000	.7832
Homo Milk 3.3% B.F.	1/2 Gal.	2	.3272	.3490	.3916
Homo Milk 3.3%B.F.	Quart	1	.1752	.1861	.2098
2%	Gallon	4	.6064	.6500	.7412
2%	1/2 Gal.	2	.3022	.3240	.3706
Chocolate Milk	Quart	1	.2037	.2146	.2483
Chocolate Skim	1/2 Gal.	2	.2882	.3100	.3706
Fortified Skim	1/2 Gal.	2	.2533	.2751	.3706
Fortified Skim	Quart	1	.1326	.1435	.2028
Buttermilk	1/2 Gal.	2	.2667	.2885	.3916
Buttermilk	Quart	1	.1363	.1492	.2098
Half & Half	Quart	2	.3657	.3875	.5876
Half & Half	Pint	1	.1872	.1981	.2973
Whipping Cream	1/2 Pint	1	.1961	.2070	.3043
Sour Cream	16 oz.	2	.3095	.3313	.4931
Sour Cream	8 Oz.	1	.1693	.1802	.2518
Sour Half & Half	16 Oz.	1	.2406	.2515	.3498
Sour Cream Dip	8 Oz.	1	.1691	.1800	.2938
Cottage Cheese	8 Oz.	1/2	.1267	.1322	.1773
Cottage Cheese	Lb.	1	.2229	.2338	.2775
Cottage Cheese	2 Lb.	2	.4204	.4422	.5025
Cottage Cheese-Flav.	Lb.	1	.2568 .2479	.2677 .2588	.2880
Dry Curd Cheese	12 Oz.	1	.2683 .2313	.2792 .2422	.2368
6%	OV	1	.3105	3313	99¢
5%			2619	2837	

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Lasorso, Christopher (Mayfair Foods) 369a
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Minard, Manley (Joseph Tittle & Sons) 382a
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Pergler, Joseph J. (Borden) 432a
Peters, Paul (Model Food Center) 412a
Schmidt, Elmer (A&P) 224a
Smith, Herschel (A&P) 198a
Szczepaniak, John (Borden) 189a
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* The deposition testimony of Mr. Malone, who was deceased at the time of the hearing, is Commission Exhibit 262.

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Exhibits*

Commission Exhibits

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CX 13J	Handwritten Borden worksheet, Feb. 9, 1965 (Malone 2619-A)	566a
CX 14	Borden private label quote to A&P, Feb. 9, 1965 (Minkler 184)	567a
CX 16	Internal Borden notes, Feb. 9, 1965 (Pentz 5591)	572a
CX 18	Borden private label quote to A&P, May 25, 1965 (Minkler 193)	574a
CX 19	Internal Borden memorandum, May 26, 1965 (Malone 2594)	590a
CX 21	Borden private label quote to A&P, July 26, 1965 (Minkler 201)	598a
CX 23	Borden memorandum submitted to A&P, 1965 (Minkler 206)	619a
CX 24	Borden schedules submitted to A&P, Aug. 4, 1965 (Minkler 206)	628a
CX 25A	Borden table submitted to A&P, Aug. 3, 1965 (Minkler 206)	636a
CX 25B-E	Internal Borden memorandum, Aug. 6, 1965 (Malone 2594)	637a

*A large number of the exhibit pages received in evidence during the proceeding below are handwritten notes, memoranda and accounting worksheets and calculations. The legibility of these exhibits is unavoidably impaired. Following the description of each exhibit is a reference to the witness through whom and the transcript page at which the exhibit was introduced.

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CX 26	Borden table submitted to A&P, Aug. 9, 1965 (Minkler 206)	641a
CX 34	Internal A&P memorandum, Aug. 11, 1965 (Bartels 1871)	642a
CX 36	Borden private label quote to A&P, Aug. 13, 1965 (Minkler 222)	643a
CX 37	Borden calculation of private label savings to A&P, Aug. 13, 1965 (Minkler 222)	677a
CX 42	Internal Borden memorandum, Aug. 16, 1965 (Minkler 222)	683a
CX 50	Bowman private label quote to A&P, Aug. 31, 1965 (Schmidt 1712)	687a
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CX 54	Handwritten Borden worksheets, Sept. 2, 1965 (Malone 2619-A)	710a
CX 56	Borden private label quote to A&P, Sept. 14, 1965 (Minkler 246)	712a
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CX 65	A&P comparison of private label quotes, 1965 (Schmidt 1714)	772a
CX 66	Internal A&P memorandum, Sept. 28, 1965 (Schmidt 1714)	774a
CX 70	Internal A&P memorandum, Oct. 14, 1965 (Schmidt 1719)	776a
CX 71	Internal Borden memorandum, Oct. 14, 1965 (Malone 2619-A)	778a
CX 75A-J	Portion of Borden's final private label quote to A&P (Tarr 893, Schmidt 1721)	780a
CX 75P-T	Borden letter, Minkler to Pentz, Dec. 7, 1965 (Minkler 297)	790a
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CX 75V-X	Internal Borden memorandum, 1965 (Minkler 304)	796a
CX 75Z(1)-Z(3)	Borden letter, Minkler to Pentz, Jan. 3, 1966 (Minkler 300-01)	799a
CX 79	Internal Borden memorandum, May 25, 1966 (Gose 1050)	802a
CX 81	Internal Borden memorandum, May 27, 1966 (Pentz 5587)	803a
CX 87	Handwritten Borden worksheets, June 19, 1966 (Malone 2619-A)	804a
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CX 90H	Internal Borden memorandum, Aug. 15, 1966 (Archer 1239)	812a

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CX 110	Internal Borden memorandum, Apr. 4, 1967 (Malone 2594)	825a
CX 123	Borden discount schedule, Jan. 3, 1966 (Tarr 925)	829a
CX 138	Borden discount schedule, Jan. 1, 1966 (Tarr 927)	832a
CX 153D-E	Borden prices to A&P, 1965, Chicago-Calumet (Tarr 903)	833a
CX 185	FTC Doc.—A&P purchases of private label items in private label and Borden label, Nov. 1965-Dec. 1968 (Bitting 747)	835a
CX 206	Borden profit and loss statement, Jan. 1965-Aug. 1966 (Walker 5480)	836a
CX 255	FTC Doc.—A&P's wholesale cost and retail prices for selected milk products, 1965-1968 (Bitting 807, 841)	840a
CX 262	Malone deposition, Feb. 9-10, 1972 (1199, 1262) (see 20a-54a)	
CX 263	A&P letter, Bartels to Smith, Oct. 1, 1965 (Smith 1376)	841a
CX 290	FTC Doc.—Borden interest payments to Wilco (Bitting 5407)	881a

Respondent A&P Exhibits

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RA&PX 40	Borden memorandum re Woodstock plant (Daube 7105)	897a

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RA&PX 101	A&P Doc.—Geographic comparison of Borden and Bowman quotations (Havemeyer 6922)	943a
RA&PX 102	A&P Doc.—Indiana A&P stores in Borden and Bowman quotations (Havemeyer 6920)	946a
RA&PX 103	A&P Doc.—Raw milk price increase adjustment (Havemeyer 6920)	967a
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RA&PX 185, p. 11	A&P Doc.—Borden's Cost to Serve A&P on Hammond Branch (Havemeyer 9808)	996a
RA&PX 246	A&P Doc.—Revised comparison of Borden and Bowman proposals (Havemeyer 9732)	996a-1
RA&PX 251	Borden-A&P correspondence re private label milk solicitation, 1971 (Stip. 9789)	998a
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Respondent Borden Exhibits

RBX 1	Borden proposal to Kroger, July 29, 1968 (Gose 1094)	1008a
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FMMA-100
3/26/74 (2)

COMPARISON OF BOWMAN (CX 50) AND BORDEN QUOTES (CX 62) (BORDEN ZONE 1)

	Borden's Quote (CX 62) at $4.32 per Cwt. (1)	Bowman's Quote (CX 50)	Bowman Lower By
QTS., 1/2 GALS. & GALS OF HOMOGENIZED MILK			
A. IN PAPER CONTAINERS	$2,521,294.96	$2,514,530.13	$ 6,764.83
VALUE OF 0.1% B.F.	25,345.75	--	
COST ADJUSTED TO 3.5% B.F.	$2,546,640.71	$2,514,530.13	$ 32,110.58
B. IN GLASS GALLON CONTAINERS (2)	$ 697,926.87	$ 592,880.88	$105,045.99
VALUE OF 0.1% B.F.	6,242.45	--	
COST ADJUSTED TO 3.5% B.F.	$ 704,169.32	$ 592,880.88	$111,288.44
TOTAL COST OF HOMOGENIZED MILK ADJUSTED TO 3.5% B.F.	$3,250,810.03	$3,107,411.01	$143,399.02
8 OTHER DAIRY ITEMS ON WHICH BORDEN OFFERED PRIVATE LABEL	$1,063,967.48	$1,082,157.59	($ 18,190.11)
TOTAL 11 ITEMS ON WHICH BORDEN OFFERED PRIVATE LABEL ADJUSTED TO 3.5% B.F. (GLASS GALLONS ARE NOT INCLUDED)	$3,610,608.19	$3,596,687.72	$ 13,920.47
10 ADDITIONAL ITEMS OFFERED BY BOWMAN IN PRIVATE OR BOWMAN LABEL AND BY BORDEN IN BORDEN LABEL ONLY	$ 592,850.94 (3)	$ 597,160.62	$ 95,690.32
TOTAL - 22 FLUID MILK ITEMS	$5,007,628.45	$4,786,729.22	$220,899.23

(1) CX 62 adjusted from $4.29 per cwt. raw milk cost to $4.32, the price in effect as of Sept 21, 1965

(2) Taken from Borden's September 14, 1965 quote (CX 56C)

(3) Based on Borden's September, 1965 prices to A&P. The ten items are sour cream (pints and 1/2 pints), pints of sour half & half, 1/2 pints of sour cream dip, 8 oz. Yogurt, 1/2 pints of milk shakes, 2% milk (offered by Borden in glass gallons and by Bowman in paper half gallons), half & half (offered by Borden in paper quarts and by Bowman in paper pints), and 2 specialty items offered by Borden (Wake-up and Triple Whip), which are comparable to 3 specialty items offered by Bowman (Boston Blend, Quick-Whip and Reddi-Whip).

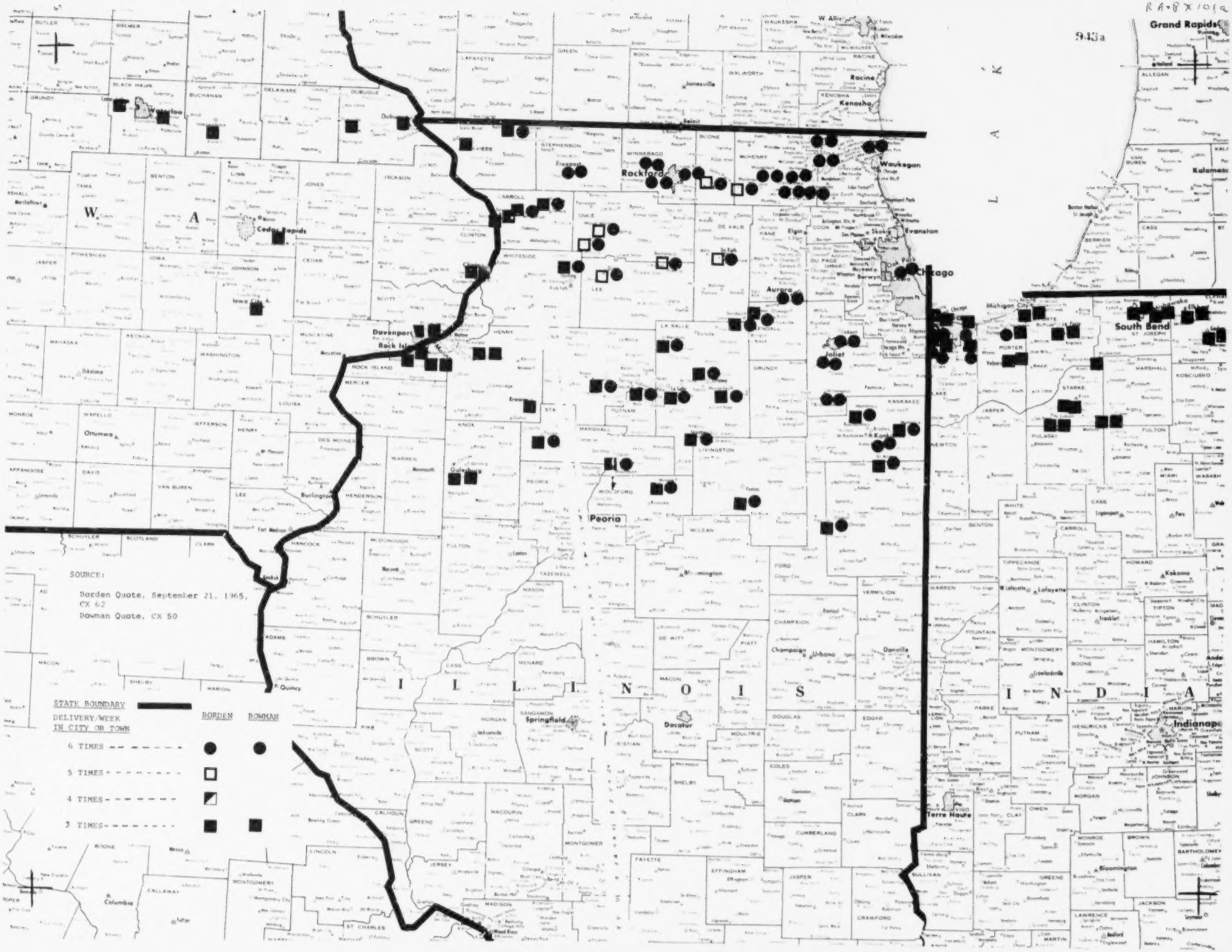
FEDERAL TRADE COMMISSION
Docket No. 8906 Exhibit No. 100
In the Matter of A&P
Date 5/24 Witness Reporter

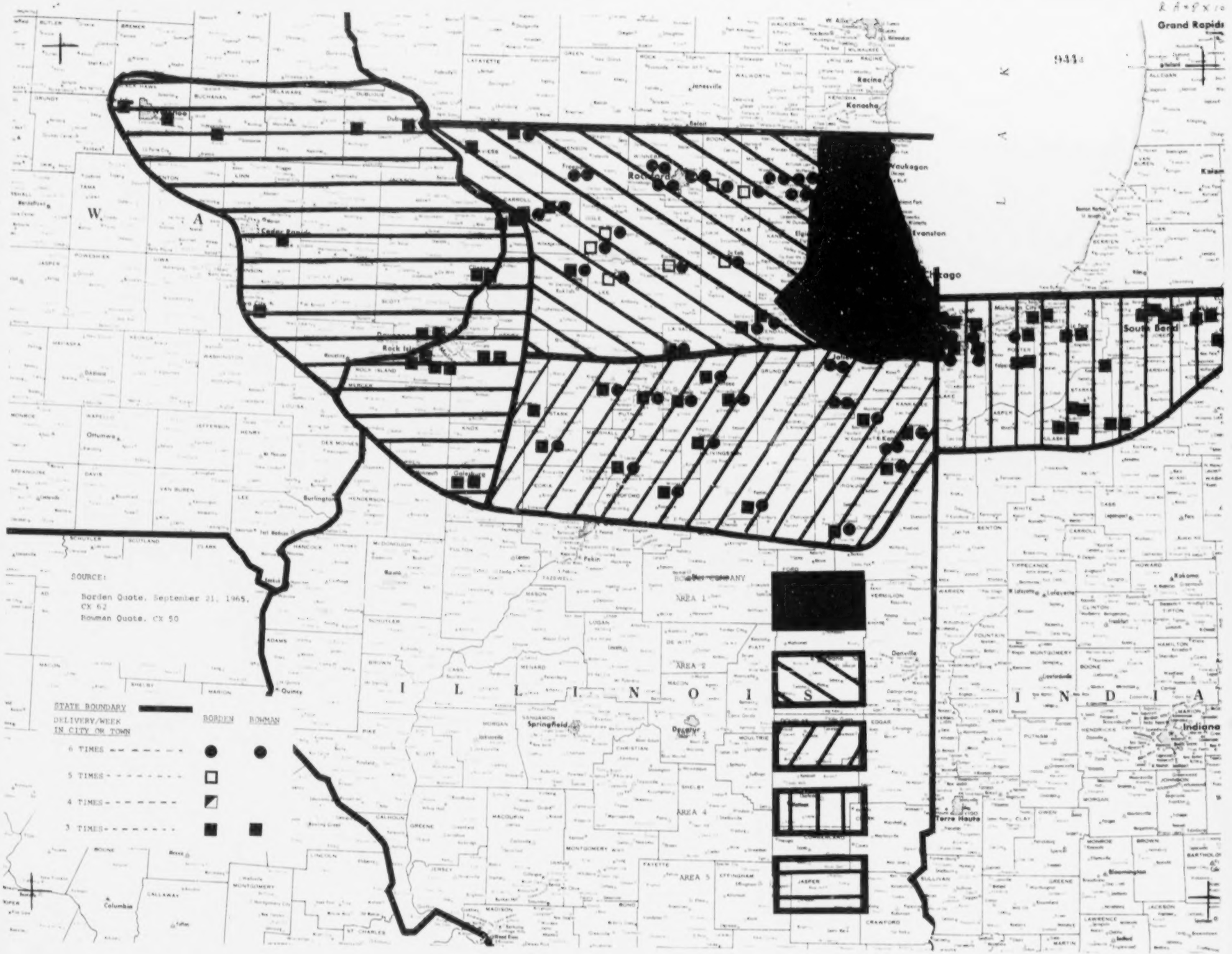
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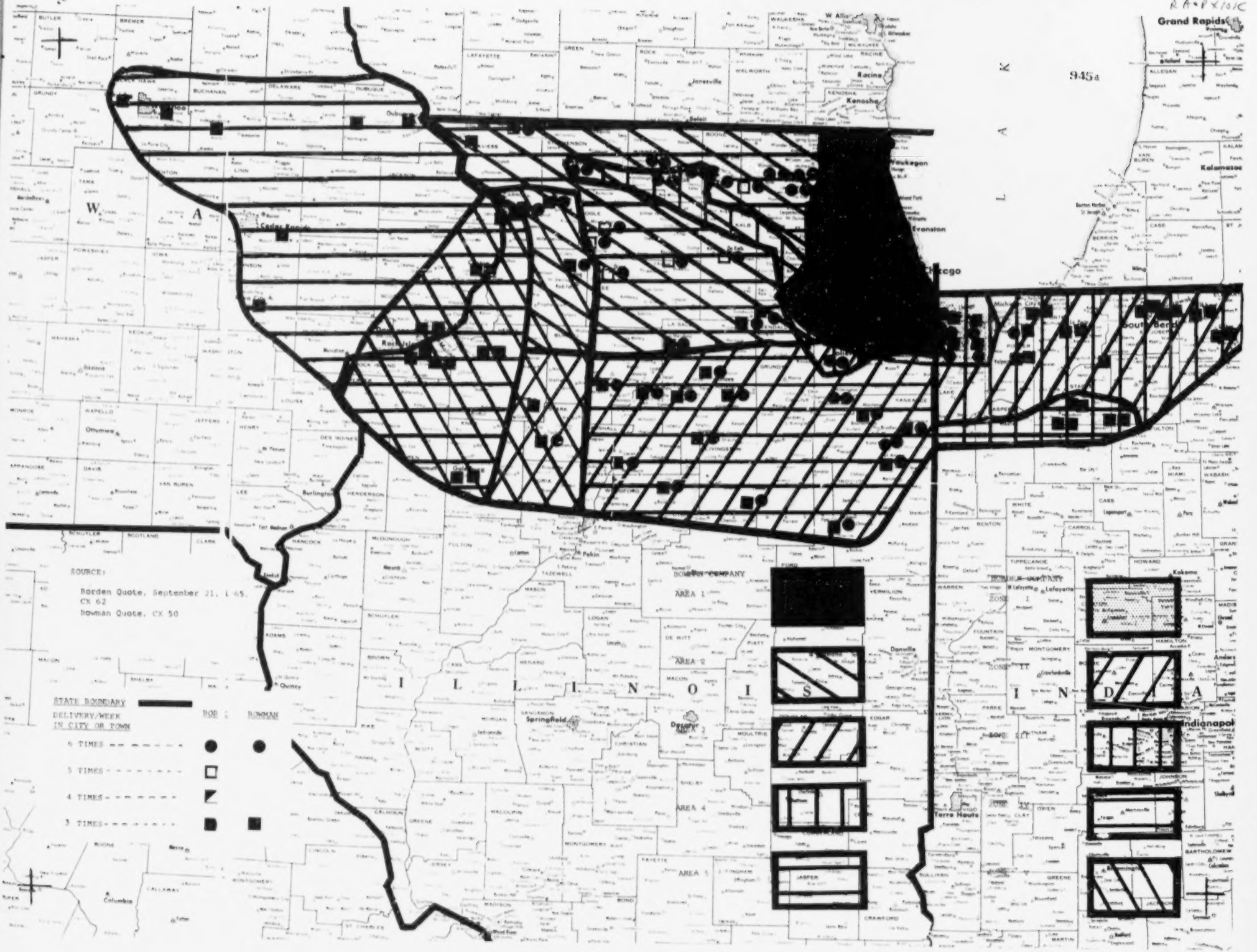
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943a




SOURCE:
Borden Quote, September 21, 1965, CX 62
Bowman Quote, CX 50
STATE BOUNDARY
DELIVERY/WEEK IN CITY OR TOWN
BORDEN
BOWMAN
6 TIMES
5 TIMES
4 TIMES
3 TIMES
AREA 1
AREA 2
AREA 3
AREA 4
AREA 5
ILLINOIS
INDIANA
Grand Rapids
Chicago
Rockford
Cedar Rapids
Rock Island
Galesburg
Burlington
Ottumwa
Quincy
Springfield
Decatur
Danville
Terre Haute
Indiana
South Bend
Evanston
Waukegan
Racine
Kenosha
Dubuque
Columbia

RA-8X151C


945a
SOURCE:
Borden Quote, September 21, 1965.
CX 62
Bowman Quote, CX 50
STATE BOUNDARY
DELIVERY/WEEK IN CITY OR TOWN
BOR
BOWMAN
6 TIMES
5 TIMES
4 TIMES
3 TIMES
AREA 1
AREA 2
AREA 4
AREA 5
ILLINOIS
INDIANA
Grand Rapids
Racine
Kenosha
Waukegan
Evanston
Kalamazoo
Ottumwa
Burlington
Quincy
Springfield
Peoria
Danville
Terre Haute
Indianapol
Columbia

LOCATION OF INDIANA A&P STORES BY BOWMAN AND BORDEN PRICING AREAS

Stores in Indiana subject to Bowman Area 4 Prices per CX 50		Borden Zone in which Number of Stores' Volume is Included, CX62		
		I	II	IV
Whiting	1	1		
Hammond	3	3		
Munster	1	1		
East Chicago	2	2		
Gary	6	6		
Portage	1	1		
Hobart	1	1		
Michigan City	1		1	
Valparaiso	1		1	
Chesterton	1		1	
North Judson	1			1
LaPorte	1		1	
Walkerton	1		1	
South Bend	8		7	
Mishawaka	1		1	
Elkhart	2		1	
Goshen	1		1	
Knox	1			1
Culver	1			1
Total Stores		15	15	3

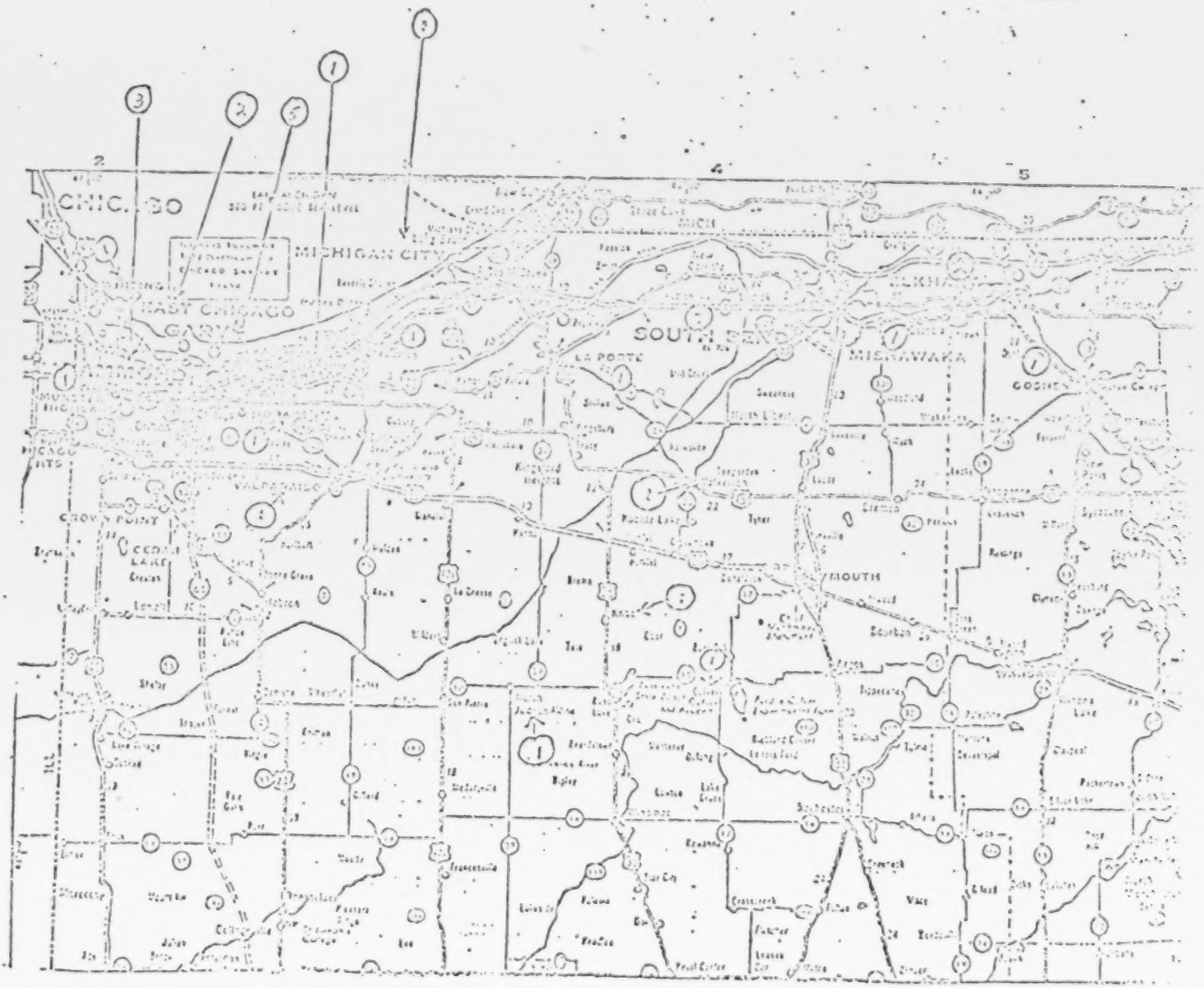
CONCLUSION -- Volume Figures for Borden Zone II should Provide a Suitable Approximation of Volume in Indiana Part of Borden's Zone I.

A

INDIANA STORES

Cx 5

WEST		EAST	
Whiting	1	North Judson	1
Hammond	3	La Porte	1
Munster	1	Walkerton	1
E. Chicago	2	Knox	1
Gary	6	South Bend	8
Michigan City	1	Culver	1
Portage	1	Mishawaka	1
Hobart	1	Elkhart	2
Valparaiso	1	Goshen	1
Chesterton	1		
	18		17



B

17

CX622

948a

Schedule No. 1 -- Part 2
(Zone No. 2)
September 21, 1965

THE BORDEN COMPANY

General Quotation -- A & P Private Label

(Related to Present Announced Superpool Class I Price of $4.32 Per Cwt.)

vate Label Products	Net Price for A & P Private Label Products by Type and Method of Delivery			
	3-Day Per Week Drop Delivery	4-Day Per Week Drop Delivery	5-Day Per Week Drop Delivery	6-Day Per Week Drop Delivery
no V.D. Milk - Gallon Paper	.5848	.6048	.6148	.6248
no V.D. Milk - 1/2 Gal. Paper	.2924	.3024	.3074	.3124
no V.D. Milk - Quart Paper	.1612	.1662	.1687	.1712
- 1/2 Cal. Paper	.2714	.2814	.2864	.2914
amin Fortified Skim - 1/2 Gal. Paper	.2634	.2734	.2784	.2834
amin Fortified Skim - Quart Paper	.1347	.1397	.1422	.1447
& Half - Pint Paper	.2337	.2397	.2422	.2447
colate Milk - Quart Paper	.2057	.2107	.2132	.2157
ermilk - 1/2 Gal. Paper	.2844	.2944	.2994	.3044
ermilk - Quart Paper	.1467	.1517	.1542	.1567
pping Cream - 1/2 Pint Paper	.2547	.2597	.2622	.2647

Prices apply to stores located in the geographical area subject to the terms of the Chicago Superpool which are as follows:

Stores Receiving 3-Day Per Week Delivery:

South Bend (6 stores), Mishawaka, Elkhart, Goshen, La Porte, Valparaiso, Walkerton and Michigan City.

Stores Receiving 6-Day Per Week Delivery:

Chesterton, South Bend (1 store).

Stores Receiving 4-Day and 5-Day Per Week Delivery:

None

(1) Above net unit prices for A & P private label products are related to delivery conditions and co-operative program as set forth on the accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of $4.32 per cwt., indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit prices for A & P private label products are subject to change in connection with changes that occur in the cost of labor and containers.

CHICAGO, CHICAGO SUBURBAN & CALUMET AREAS

CX 36F

Includes The Following Cities and Towns:

ILLINOIS

Chicago
Arlington Heights
Barrington
Batavia
Bensenville
Berwyn
Blue Island
Brookfield
Chicago Heights
Chicago Ridge
Cicero
Des Plaines
Dolton
Downers Grove
Dundee
Elgin
Elmhurst
Evanston
Evergreen Park
Franklin Park
Glen Ellyn
Glenview
Harvey
Highland Park
Highwood
Homewood
La Grange
Lake Bluff
Lake Forest
Libertyville
Maywood
Midlothian
Mt. Prospect
Mundelein
Naperville
Niles
Norridge
Northbrook
Oak Lawn
Oak Park
Palatine
Park Ridge
Richton Park
Riverside
Schaumberg
Skokie
St. Charles
Summit
Villa Park
Waukegan
Western Springs
Wheaton
Wilmette
Winnetka

INDIANA

East Chicago
Gary
Hammond
Hobart
Portage
Munster
Whiting

D

Cx 62 K

950a

Schedule No. 3 - Part 2
(Zone No. 4)
September 21, 1965

The Borden Company

General Quotation - A & P Private Label

(Related to the Announced Class I Price Under Federal Order No. 30 of $3.73 per Cwt.)

Net Price for A & P Private Label Products by Type and Method of Delivery

Private Label Products	3-Day Per Week Drop Delivery	4-Day Per Week Drop Delivery	5-Day Per Week Drop Delivery	6-Day Per Week Drop Delivery
omo V.D. Milk - Gal. Paper	.5380	.5580	.5680	.5780
omo V.D. Milk - 1/2 Gal. Paper	.2690	.2790	.2840	.2890
omo V.D. Milk - Quart Paper	.1495	.1545	.1570	.1595
% - 1/2 Gal. Paper	.2480	.2580	.2630	.2680
itamin Fortified Skim Milk - 1/2 Gal. Paper	.2400	.2500	.2550	.2600
itamin Fortified Skim Milk - Quart Paper	.1230	.1280	.1305	.1330
alf & Half - Pint Paper	.2230	.2280	.2305	.2330
ocolate Milk - Quart Paper	.1940	.1990	.2015	.2040
ttermilk - 1/2 Gal. Paper	.2610	.2710	.2760	.2810
ttermilk - Quart Paper	.1350	.1400	.1425	.1450
hipping Cream - 1/2 Pint Paper	.2430	.2480	.2505	.2530

Prices apply to stores located in the geographical area subject to the announced Class I milk prices under Federal Order No. 30, (which Class I milk prices are not subject to producer "superpool" payments) which stores are as follows:

Stores Receiving 3-Day Per Week Delivery:

Manteno	Momence	St. Annes	Gilman	La Salle
Marseilles	Ottawa	Streator	Pontiac	Princeton
Spring Valley	Sandwich	Plano	Lacon	Minonk
Culver	Knox	North Judson	Galena	Warren
Mendota				

Stores Receiving 4-Day Per Week Delivery:

None

Stores Receiving 5-Day Per Week Delivery

Belvidere	Marengo	DeKalb
Rochelle	Polo	Mt. Morris
Dixon		

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VOLUME OF A&P FLUID MILK ITEMS - CHICAGO & SUBURBS -1965
(SELECTED MONTHS)

II-2

	Points/ Unit P.7 Procedures Outline	5/8	5/15	5/22	5/29	Total for May	Total Points Col.1x6 May	9/4	9/11	9/18	9/25	Total for September	Total Points Col.(1)x(12)	LINE NO.
Homo-Paper-Gallon	4	11,338	10,852	10,999	11,479	44,668	178,672	12,478	10,845	11,296	11,671	46,290	185,160	
-½ Gallon	2	78,614	75,878	76,163	80,117	310,772	621,544	89,681	73,548	79,493	81,353	324,075	648,150	
-Quart	1	37,454	36,160	36,317	37,055	146,986	146,986	41,068	34,174	37,617	38,317	151,176	151,176	
Sub-Total						502,426						521,541		
2%-(Golden Del)½ Gallon	2	9,690	9,350	9,318	9,736	38,094	76,188	10,426	8,937	9,456	9,428	38,247	76,494	
Fort. Skim - ½ Gallon	2	8,847	8,425	8,439	8,643	34,354	68,708	8,355	7,299	7,894	8,021	31,569	63,138	
- Quart	1	8,574	7,995	7,648	8,215	32,432	32,432	7,839	6,997	7,234	7,641	29,711	29,711	
Buttermilk ½ Gallon	2	5,197	5,245	4,908	4,918	20,268	40,536	4,071	4,086	4,087	4,503	16,747	33,494	
Quart	1	9,504	9,226	8,889	8,920	36,539	36,539	8,224	7,385	7,726	8,185	31,520	31,520	
Choco.Milk Quart	1	2,614	2,593	2,458	2,603	10,268	10,268	3,111	5,301	2,556	2,850	13,818	13,818	
Half & Half Pint	1	24,838	24,014	23,709	26,450	99,011	99,011	26,925	22,323	23,659	23,666	96,573	96,573	
Wh. Cream ½ Pint	1	4,213	3,897	4,278	6,260	18,648	18,648	3,144	2,517	2,850	2,770	11,281	11,281	
8 Item Sub-Total						289,614						269,466		
11 Item Sub-Total						792,040								
Homo-Glass-Gallon	4	14,739	14,320	14,270	14,777	58,106	232,424	15,602	13,628	14,664	14,512	58,406	233,624	15
Sub-Total Line 15 & Line 17						850,146								
2%(Golden Del)Glass Gallon	4	4,096	3,851	3,884	3,944	15,775	63,100	4,088	3,564	3,802	3,725	15,179	60,716	17
Half & Half, Quart Paper	2	1,069	1,040	1,116	1,142	4,367	8,734	983	879	904	922	3,688	7,376	19
Sour Cream -Pt. (16 oz.)	2	2,974	2,983	3,049	3,664	12,670	25,340	3,251	2,727	2,630	2,624	11,232	22,464	20
" " ½ Pt. (8 oz.)	1	6,579	6,463	6,996	7,915	27,953	27,953	6,843	5,610	5,773	5,812	24,038	24,038	21
" Half & Half - Pt.	2	2,922	3,046	3,146	3,770	12,884	25,768	3,150	2,593	2,360	2,232	10,335	20,670	22
Sour Cream Dips-(8 oz.)	1	1,479	1,460	1,094	1,695	8,728	8,728	1,763	1,275	1,330	1,369	5,737	5,737	23
Yogurt	1	2,700	2,599	2,675	2,594	10,568	10,568	2,197	1,909	2,188	2,050	8,344	8,344	24
Shakes 1/2 Pint	½	-	-	-	-	-	-	9,153	6,664	14,547	7,535	37,899	9,475	25
Sub Total Line 19-26						92,945						116,452		26
Triple Whip 8 oz	1	2,762	671	1,216	1,657	6,306	6,306	902	621	706	987	3,216	3,216	
Wake Up Pint	2	766	708	835	1,013	3,322	6,644	623	427	449	372	1,871	3,742	
Choco.Skim - ½ Gal	2	1,315	1,327	1,341	1,369	5,352	10,704	1,310	1,112	1,227	1,296	4,945	9,890	
Choco ½ Pint Handi Paks	½	2,030	2,080	2,035	1,936	8,081	2,020	1,207	1,005	1,281	1,328	4,821	1,205	

F

SCHEDULE OF POINTS USED TO COMPUTE PRICES

	Point Value
All Gallons Milk Products	4
All Half Gals. " "	2
All Quarts " "	1
1/2 Pints Whipping Cream	1
Pints Half & Half	1
Quarts Half & Half	2
8 oz. Sour Cream	1
16 oz. Sour Cream	2
Pint (16 oz.) Sour Half & Half	1
1/2 Pint (8 oz.) Sr. " "	1/2
8 oz. Sour Cream Dips	1
1/2 Pint Elsie Shakes	1/4
* 7 oz. Triple Whip	1
* 8 oz. Yogurt	1
* Pint Coffee Whitener	1
* 2 Lb. Cottage Cheese	2
* 1 Lb. Cottage Cheese	1
* 8 oz. Cottage Cheese	1/2
* 12 oz. Cottage Cheese	1
* Quart Egg Nog	1

*These products are not subject to market fluctuations of Class I Milk and are not on Class I formula pricing.

Chgo & Suburbs.

953a

636-47D
10-26-65

THE BORDEN COMPANY
CENTRAL DIVISION
1821 S. KILBOURN
CHICAGO ILLINOIS 60623

RECAP TOTALS

W/E 9 25 1965

ITEM	PRODUCT			QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS		GAL	14512	.6981	10,130.73	
2	HOMO VD MILK		GAL	11671	.7371	8,602.53	
3	HOMO VD MILK	1/2	GAL	81353	.3615	29,978.51	
4	HOMO VD MILK		QTS	38317	.2000	7,663.40	
7	CHOC MILK		QTS	2850	.2437	694.39	
8	CHOC MILK HANDI-PK	1/2	PTS	1328	.0648	86.04	
9	CHOC SHAKE	1/2	PTS	7535	.0930	700.75	
10	CHOC SKIM	1/2	GAL	1296	.2000	447.39	
12	BUTTERMILK	1/2	GAL	4503	.3685	1,659.25	
13	BUTTERMILK		QTS	8185	.2000	1,637.00	
15	GOLDEN DEL-GLASS		GAL	3725	.6500	2,421.25	
16	GOLDEN DEL	1/2	GAL	9428	.3453	3,255.33	
17	FORT SKIM	1/2	GAL	8021	.3453	2,769.54	
18	FORT SKIM		QTS	7641	.1917	1,464.67	
21	WHIPPING CREAM	1/2	PTS	2770	.3068	849.75	
22	HALF&HALF		QTS	922	.5895	543.48	
23	HALF&HALF		PTS	23666	.2984	7,061.82	
24	SOUR CREAM		16-OZ	2624	.4915	1,289.59	
25	SOUR CREAM		8-OZ	5812	.2474	1,437.74	
X26	SOUR CREAM DIPS		8-OZ	1369	.2947	403.39	
X28	ORANGE DRINK	1/2	GAL	243-	.2581	62.72-	
X30	FRUIT PUNCH	1/2	GAL	130-	.2581	33.55-	
X31	LEMONADE	1/2	GAL	58-	.2581	14.96-	
34	SOUR HALF&HALF		PTS	2232	.3574	798.49	
35	TRIPLE WHIP		8-OZ	987	.2033 .4089	403.42	
36	YOGURT	1/2	PTS	2050	.2038	417.71	
46	WAKE UP		PTS	372	.2198	78.31	
47	NUMBER GAL IN			18237	.15	2,735.55	
50	NUMBER GAL OUT			19720-	.15	2,958.00-	

$ 84,460.80 $ 107,065.93

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THE BORDER COMPANY
CENTRAL DIVISION
1821 S. KILBOURN
CHICAGO ILLINOIS 60623

Chicago + Suburbs

RECAP TOTALS

W/E 9 18 1965

ITEM	PRODUCT		QUANTITY	NET PRICE	INVOICE AMT	RETAIL PRICE RETAIL AMT
1	HOMO VD MILK-GLASS	GAL	14664	.6981	10,236.82	.79
2	HOMO VD MILK	GAL	11296	.7371	8,326.16	.89
3	HOMO VD MILK	1/2 GAL	79493	.3685	29,293.08	.47
4	HOMO VD MILK	QTS	37617	.20	7,523.40	.26
7	CHOC MILK	QTS	2556	.2437	622.71	.33
8	CHOC MILK HANDI-PK	1/2 PTS	1281	.0648	82.97	.0875
9	CHOC SHAKE	1/2 PTS	14547	.08 SPEC	1,163.76	.125
10	CHOC SKIM	1/2 GAL	1227	.3453	423.55	.45
12	BUTTERMILK	1/2 GAL	4087	.3685	1,505.99	.47
13	BUTTERMILK	QTS	7726	.20	1,545.20	.26
15	GOLDEN DEL-GLASS	GAL	3802	.65	2,471.30	.75
16	GOLDEN DEL	1/2 GAL	9456	.3453	3,265.05	.45
17	FORT SKIM	1/2 GAL	7894	.3453	2,725.69	.45
18	FORT SKIM	QTS	7234	.1917	1,386.55	.25
21	WHIPPING CREAM	1/2 PTS	2850	.3068	874.28	.40
22	HALF&HALF	QTS	904	.5895	532.88	.78
23	HALF&HALF	PTS	23659	.2984	7,059.73	.39
24	SOUR CREAM	16-OZ	2630	.4915	1,292.51	.69
25	SOUR CREAM	8-OZ	5773	.2474	1,428.11	.39
26	SOUR CREAM DIPS	8-OZ	1330	.2947	391.89	.39
28	ORANGE DRINK	1/2 GAL	5	.2581	1.29	.35
31	LEMONADE	1/2 GAL	3	.2581	.78	.35
34	SOUR HALF&HALF	PTS	2360	.3578	844.36	.49
35	TRIPLE WHIP	8-OZ	706	.4089	288.57	.55
36	YOGURT	1/2 PTS	2188	.2038	445.74	.29
46	WAKE UP	PTS	449	.2108	94.52	.29
47	NUMBER GAL IN		18466	.15	2,769.90	
50	NUMBER GAL OUT		19308-	(.15)	2,896.20-	
					$ 83,700.59	$ 106,346.17

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4-65

THE BORDEN COMPANY
CENTRAL DIVISION
1821 S. KILBOURN
CHICAGO ILLINOIS 60623

CHICAGO + SUBURBS

RECAP TOTALS W/E 9 11 1965

ITEM	PRODUCT		QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	GAL	13628	.6981	9,513.59	.7900
2	HOMO VD MILK	GAL	10845	7371	7,993.76	.8900
3	HOMO VD MILK	1/2 GAL	73548	.3685	27,102.31	.4700
4	HOMO VD MILK	QTS	34174	.2000	6,834.80	.2600
7	CHOC MILK	QTS	5301	.2000 SPEC	1,060.20	.3300
8	CHOC MILK HANDI-PK	1/2 PTS	1005	0648	65.11	.0875
9	CHOC SHAKE	1/2 PTS	6664	.093	619.76	.1250
10	CHOC SKIM	1/2 GAL	1112	.3453	383.82	.4500
12	BUTTERMILK	1/2 GAL	4086	3685	1,505.60	.4700
13	BUTTERMILK	QTS	7385	.2000	1,477.00	.2600
15	GOLDEN DEL-GLASS	GAL	3564	.6500	2,316.60	.7500
16	GOLDEN DEL	1/2 GAL	8937	3453	3,085.81	.4500
17	FORT SKIM	1/2 GAL	7299	3453	2,520.22	.4500
18	FORT SKIM	QTS	6997	.1917	1,341.17	.2500
21	WHIPPING CREAM	1/2 PTS	2517	3068	772.12	.4000
22	HALF&HALF	QTS	879	.5895	518.17	.7800
23	HALF&HALF	PTS	22323	2984	6,661.03	.3900
24	SOUR CREAM	16-OZ	2727	.4915	1,340.23	.6900
25	SOUR CREAM	8-OZ	5610	2474	1,387.78	.3900
26	SOUR CREAM DIPS	8-OZ	1275	.2947	375.77	.3900
28	ORANGE DRINK	1/2 GAL	20	.2581	5.16	.3500
30	FRUIT PUNCH	1/2 GAL	6	.2581	1.55	.3500
31	LEMONADE	1/2 GAL	11	.2581	2.83	.3500
34	SOUR HALF&HALF	PTS	2593	3578	927.65	.4900
35	TRIPLE WHIP	8-OZ	621	4089	253.83	.5500
36	YOGURT	1/2 PTS	1909	2038	388.94	.2900
46	WAKE UP	PTS	427	2108	89.89	.2900
47	NUMBER GAL IN		17192	.15	2,578.80	.15
50	NUMBER GAL OUT		18258-	(.15)	2,738.70-	.15
					$ 78,384.80	$ 99,718.29

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Chicago Suburbs

956a

THE BORDEN COMPANY
CENTRAL DIVISION
1821 S. KILBOURN
CHICAGO ILLINOIS 60623

RECAP TOTALS

W/E 9 4 1965

ITEM	PRODUCT		QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	GAL	15602	.6981	10,891.64	
2	HOMO VD MILK	GAL	12478	.7371	9,197.38	
3	HOMO VD MILK	1/2 GAL	89681	.3685	33,047.42	
4	HOMO VD MILK	QTS	41068	.2000	8,213.60	
7	CHOC MILK	QTS	3111	.2437	757.95	
8	CHOC MILK HANDI-PK	1/2 PTS	1207	.0648	78.20	
9	CHOC SHAKE	1/2 PTS	9153	.0930	851.25	
10	CHOC SKIM	1/2 GAL	1310	.3453	452.25	
12	BUTTERMILK	1/2 GAL	4071	.3685	1,500.03	
13	BUTTERMILK	QTS	8224	.2000	1,644.80	
15	GOLDEN DEL-GLASS	GAL	4088	.6500	2,657.20	
16	GOLDEN DEL	1/2 GAL	10426	.3453	3,599.96	
17	FORT SKIM	1/2 GAL	8355	.3453	2,884.95	
18	FORT SKIM	QTS	7839	.1917	1,502.53	
21	WHIPPING CREAM	1/2 PTS	3144	.3068	964.45	
22	HALF&HALF	QTS	983	.5895	579.48	
23	HALF&HALF	PTS	26925	.2984	8,034.36	
24	SOUR CREAM	16-OZ	3251	.4915	1,597.77	
25	SOUR CREAM	8-OZ	6843	.2474	1,692.83	
26	SOUR CREAM DIPS	8-OZ	1763	.2947	519.51	
28	ORANGE DRINK	1/2 GAL	995	.2191	217.99	
30	FRUIT PUNCH	1/2 GAL	652	.2191	142.86	
31	LEMONADE	1/2 GAL	1012	.2191	221.78	
32	GRAPE	1/2 GAL	249	.2191	54.59	
34	SOUR HALF&HALF	PTS	3150	.3578	1,126.98	
35	TRIPLE WHIP	8-OZ	902	.4089	368.69	
36	YOGURT	1/2 PTS	2197	.2038	447.60	
46	WAKE UP	PTS	623	.2108	131.21	
47	NUMBER GAL IN		19690	.15	2,953.50	
50	NUMBER GAL OUT		19364-	.15	2,979.60-	

$ 93,353.16 $ 118,627.06

Milk

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6-1-65

B-6000

THE BORDEN COMPANY

Chicago & Suburbs

RECAP TOTALS

W/E 5 29 1965

ITEM	PRODUCT			QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	79	GAL	14777	6981	10,315.67 ✓	
2	HOMO VD MILK	81	GAL	11479	7371	8,461.01 ✓	
3	HOMO VD MILK	47 1/2	GAL	80117	3685	29,523.05 ✓	
4	HOMO VD MILK	26	QTS	37055	20	7,411.00 ✓	
7	CHOC MILK	23	QTS	2603	2437	634.21 ✓	
8	CHOC MILK HANDI-PK	1/2	PTS	1936	0648	125.44 ✓	
10	CHOC SKIM	45 1/2	GAL	1369	3453	472.60 ✓	
12	BUTTERMILK	47 1/2	GAL	4918	3685	1,812.18 ✓	
13	BUTTERMILK	26	QTS	8920	20	1,784.00 ✓	
15	GOLDEN DEL-GLASS	75	GAL	3944	65	2,563.60 ✓	
16	GOLDEN DEL	45 1/2	GAL	9736	3453	3,361.69 ✓	
17	FORT SKIN	45 1/2	GAL	8643	3453	2,984.42 ✓	
18	FORT SKIN	26	QTS	8215	1917	1,574.65 ✓	
21	WHIPPING CREAM	40 1/2	PTS	6260	2715	1,693.84 ✓	
22	HALF&HALF	74	QTS	1142	5815	673.17 ✓	
23	HALF&HALF	31	PTS	26450	2984	7,892.54 ✓	
24	SOUR CREAM	69	16-OZ	3664	4915	1,800.85 ✓	
25	SOUR CREAM	39	8-OZ	7915	2474	1,958.01 ✓	
26	SOUR CREAM DIPS	21	8-OZ	1695	2947	499.40 ✓	
34	SOUR HALF&HALF	41	PTS	3770	3578	1,348.80 ✓	
35	TRIPLE WHIPS		8-OZ	1657	4089	677.42 ✓	
36	YOGURT	1 1/2	PTS	2594	2036	528.57 ✓	
46	WAKE UP	21	PTS	1013	2108	213.40 ✓	
47	NUMBER GAL IN	15		18721	15	2,808.15 ✓	
50	NUMBER GAL OUT	15		20309	15	3,046.35 ✓	
						$ 88,071.32 ✓	$ 112,289.56 ✓

Chicago & Suburbs

THE BORDEN COMPANY

RECAP TOTALS

W/E 5 22 1965

ITEM	PRODUCT		QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	GAL	14270		9,961.75	
2	HOMO VD MILK	GAL	10999		8,107.20	
3	HOMO VD MILK	1/2 GAL	76163		28,066.00	
4	HOMO VD MILK	QTS	36317		7,263.40	
7	CHOC MILK	QTS	2458		598.84	
8	CHOC MILK HANDI	1/2 PTS	2035		131.79	
10	CHOC SKIM	1/2 GAL	1341		462.96	
12	BUTTERMILK	1/2 GAL	4908		1,808.52	
13	BUTTERMILK	QTS	8889		1,777.80	
15	GOLDEN DEL-GLASS	GAL	3884		2,524.60	
16	GOLDEN DELUXE	1/2 GAL	9318		3,217.37	
17	FORT SKIM	1/2 GAL	8439		2,913.93	
18	FORT SKIM	QTS	7648		1,465.92	
21	WHIPPING CREAM	1/2 PTS	4278		1,312.40	
22	HALF&HALF	QTS	1116		657.88	
23	HALF&HALF	PTS	23709		7,074.57	
24	SOUR CREAM	16-OZ	3049		1,498.53	
25	SOUR CREAM	8-OZ	6996		1,730.67	
26	SOUR CREAM DIPS	8-OZ	4094		945.20	
34	SOUR HALF&HALF	PTS	3146		1,125.57	
35	TRIPLE WHIP	8-OZ	1216		497.12	
36	YOGURT	1/2 PTS	2675		545.03	
46	WAKE UP	PTS	835		175.85	
47	NUMBER GAL IN		18156		2,723.40	
50	NUMBER GAL OUT		19788		2,968.20-	
					$ 83,618.10	$ 106,568.11

C 21918 # 5615

Chicago Suburbs

THE BORDEN COMPANY

RECAP TOTALS

W/E 5 15 1965

ITEM	PRODUCT		QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS		GAL 14320	6981	9,996.62 ✓	
2	HOMO VD MILK		GAL 10852	7371	7,998.81 ✓	
3	HOMO VD MILK	1/2	GAL 75878	3685	27,960.99 ✓	
4	HOMO VD MILK		QTS 36160	20	7,232.00 ✓	
7	CHOC MILK		QTS 2593	2437	631.80 ✓	
8	CHOC MILK HANDI-PK	1/2	PTS 2080	2648	134.74 ✓	
10	CHOC SKIM	1/2	GAL 1327	3453	458.07 ✓	
12	BUTTERMILK	1/2	GAL 5245	3685	1,932.68 ✓	
13	BUTTERMILK		QTS 9226	20	1,845.20 ✓	
15	GOLDEN DEL-GLASS		GAL 3851	65	2,503.15 ✓	
16	GOLDEN DEL	1/2	GAL 9350	3453	3,228.45 ✓	
17	FORT SKIM	1/2	GAL 8425	3453	2,909.05 ✓	
18	FORT SKIM		QTS 7995	1917	1,532.53 ✓	
21	WHIPPING CREAM	1/2	PTS 3897	3062	1,195.48 ✓	
22	HALF&HALF		QTS 1040	5215	613.04 ✓	
23	HALF&HALF		PTS 24014	2980	7,165.66 ✓	
24	SOUR CREAM	16-OZ	2983	4915	1,466.09 ✓	
25	SOUR CREAM	8-OZ	6463	2474	1,598.81 ✓	
26	SOUR CREAM DIPS	8-OZ	1460	3447	430.22 ✓	
34	SOUR HALF&HALF	PTS	3046	3578	1,089.73 ✓	
35	TRIPLE WHIP	8-OZ	671	4079	274.27 ✓	
36	YOGURT	1/2 PTS	2599	2038	529.53 ✓	
46	WAKE UP	PTS	708	2108	149.06 ✓	
47	NUMBER GAL IN		18170	15	2,725.50 ✓	
50	NUMBER GAL OUT		20053-	15	3,007.95- ✓	
					$ 82,593.53	$ 104,841.64 ✓

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PROJECTED ANNUAL VOLUME OF SELECTED FLUID MILK ITEMS OFFERED TO A & P IN EITHER BORDEN OR PRIVATE LABEL BUT AVAILABLE ONLY IN BORDEN LABEL FROM BORDEN CO.

(Borden Zone I)

PRODUCT	Annual CX62 Zone I	Units CX56 Zone I	Assumed Annual Units	Points Per Unit (1)	Annual Points Zone I	% of Base Annual Points	Total Contract Points, Chicago & Suburbs, Selected Weeks, 1965 4Wks.End 5/29	4Wks.End 9/25	Total (2)	% of Identified Annual Point Volume 4Wks. End 5/29	4Wks. End 9/25	8 Selected Weeks	Selected for Projections
Homo-Paper Gallon	773,327	773,327	773,327	4	3,093,308		178,672	185,160	363,832				
" " 1/2 Gallon	5,321,403	5,321,403	5,321,403	2	10,642,806		621,544	648,150	1,269,694				
" " Quart	2,194,591	2,194,591	2,194,591	1	2,194,591		146,986	151,176	298,162				
2% - Paper 1/2 Gallon	612,231	612,231	612,321	2	1,224,462		76,188	76,494	152,682				
Fort.Skim Paper ½ Gallon	515,996	515,996	515,996	2	1,031,992		68,708	63,138	131,846				
" " " Quart	445,587	445,587	445,587	1	445,587		32,432	29,711	62,143				
Buttermilk " ½ Gallon	331,344	331,344	331,344	2	662,688		40,536	33,494	74,030				
" " Quart	542,083	542,083	542,083	1	542,083		36,539	31,520	68,059				
Choco.Milk " "	163,037	163,037	163,037	1	163,037		10,268	13,818	24,086				
Half & Half " Pint	1,577,403	1,577,403	1,577,403	1	1,577,403		198,022	193,146	391,168				
Whipping Cream Paper ½ Pint	256,481	256,481	256,481	1	256,481		18,648	11,281	29,929				
Sub-Total-Borden Private Label Points					21,834,438	100.00%	1,428,543	1,437,088	2,865,631	100.00	100.00	100.00	100.00
Homo Glass Gallon	N.A.	999,752	999,752	4	3,999,008	18.32	232,424	233,624	466,048	16.27	16.26	16.26	18.32
Sub-Total Annual Point Volume					25,833,446								
2% Glass Gallon		265,390		4	1,061,560	4.86	63,100	60,716	123,816	4.42	4.22	4.32	4.06
Sub-Total - Point volume					26,895,006								
Half & Half - Paper Quart	N.A.	N.A.		2			17,468	14,752	32,220	1.22	1.03	1.12	1.12
Sour Cream - 16oz. Pint	N.A.	N.A.		2			25,340	22,464	47,804	1.77	1.56	1.67	1.67
" " - 8oz. ½ Pint	N.A.	N.A		1			27,953	24,038	51,991	1.96	1.67	1.81	1.81
" Half & Half -16 oz. Pint	N.A.	N.A.		1			25,768	20,670	46,438	1.80	1.44	1.62	1.62
Sour Cream Dips - 8 oz.	N.A.			2			8,728	5,737	14,465	.61	.40	.50	.50
Yogurt - 8 oz.	N.A.			1			10,568	8,344	18,912	.74	.58	.66	.66
Shakes - ½ Pint	N.A.			¼			N.A.	9,475	9,475	-	.66	.33	.66
Tripple Whip - 8 oz.	N.A.			1			6,306	3,216	9,522	.44	.22	.33	.33
Wake Up -Pint	N.A.			1			6,644	3,742	10,386	.47	.26	.36	.36
TOTAL % OF POINTS FOR PROJECTION													31.91%

N.A. - DATA NOT INCLUDED
(1) Procedure Outline - Milk Pricing, A & P - P.7
(2) See II -2

P

Chicago + Suburbs

THE BORDEN COMPANY

RECAP TOTALS

W/E 5 8 1965

ITEM	PRODUCT		QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	GAL	14739		10,289.11	
2	HOMO VD MILK	GAL	11338		8,357.14	
3	HOMO VD MILK	1/2 GAL	78614		28,969.23	
4	HOMO VD MILK	QTS	37454		7,490.80	
7	CHOC MILK	QTS	2614		636.86	
8	CHOC MILK HANDI-PK	1/2 PTS	2030		131.48	
10	CHOC SKIM	1/2 GAL	1315		453.96	
12	BUTTERMILK	1/2 GAL	5197		1,915.03	
13	BUTTERMILK	QTS	9504		1,900.80	
15	GOLDEN DEL-GLASS	GAL	4096		2,662.40	
16	GOLDEN DEL	1/2 GAL	9690		3,345.79	
17	FORT SKIM	1/2 GAL	8847		3,054.76	
18	FORT SKIM	QTS	8574		1,643.41	
21	WHIPPING CREAM	1/2 PTS	4213		1,292.43	
22	HALF&HALF	QTS	1068		629.56	
23	HALF&HALF	PTS	24838		7,411.53	
24	SOUR CREAM	16-OZ	2974		1,461.64	
25	SOUR CREAM	8-OZ	6579		1,627.51	
26	SOUR CREAM DIPS	8-OZ	1479		435.74	
34	SOUR HALF&HALF	PTS	2922		1,045.34	
35	TRIPLE WHIP	8-OZ	2762		1,052.26	
36	YOGURT	1/2 PTS	2700		550.14	
46	WAKE UP	PTS	766		161.35	
47	NUMBER GAL IN		18835		2,825.25	
50	NUMBER GAL OUT		19956-		2,993.40-	
					$ 86,350.12	$ 109,711.57

SCHEDULE OF POINTS USED TO COMPUTE PRICES

		Point Value
	All Gallons Milk Products	4
	All Half Gals. " "	2
	All Quarts " "	1
	1/2 Pints Whipping Cream	1
	Pints Half & Half	1
	Quarts Half & Half	2
	8 oz. Sour Cream	1
	16 oz. Sour Cream	2
	Pint (16 oz.) Sour Half & Half	1
	1/2 Pint (8 oz.) Sr. " "	1/2
	8 oz. Sour Cream Dips	1
*	1/2 Pint Elsie Shakes	1/4
*	7 oz. Triple Whip	1
*	8 oz. Yogurt	1
*	Pint Coffee Whitener	1
*	2 Lb. Cottage Cheese	2
*	1 Lb. Cottage Cheese	1
*	8 oz. Cottage Cheese	1/2
*	12 oz. Cottage Cheese	1
*	Quart Egg Nog	1

*These products are not subject to market fluctuations of Class I Milk and are not on Class I formula pricing.

963a

CENTRAL DIVISION
ZONE NO. I - CHICAGO AND CALUMET AREA

CX. 62C

COMMODITY	YEARLY USAGE	BORDEN LABEL UNIT COST	BORDEN LABEL ANNUAL COST	A & P LABEL UNIT COST	A & P LABEL ANNUAL COST	DIFFERENTIAL ANNUAL BASIS
Gals. Homo Paper	773,327	$.7371	$ 570,024	$.6220	$ 481,009	$ 89,015
½ Gals. Homo	5,321,403	.3685	1,960,937	.3110	1,654,956	305,981
Qts. Homo	2,194,591	.2000	438,915	.1705	374,178	64,737
Qts. Chocolate	163,037	.2437	39,728	.2150	35,053	4,675
½ Gals. Buttermilk	331,344	.3685	122,096	.3030	100,397	21,699
Qts. Buttermilk	542,083	.2000	108,420	.1560	84,565	23,855
½ Gals. 2%	612,231	.3453	211,397	.2900	177,547	33,850
½ Gals. Skim	515,996	.3453	178,169	.2820	145,511	32,658
Qts. Skim	445,587	.1917	85,419	.1440	64,165	21,254
½ Pts. Whip Cream	256,481	.3068	78,693	.2640	67,711	10,982
Pts. Half-Half	1,577,403	.2984	470,704	.2440	384,886	85,818
TOTAL			$4,264,502		$3,569,978	$694,524

21,831,138 Qts.

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THE BORDEN COMPANY
Central Division

9-14-65 5

CX 56C

mated Annual Quotation Differentials - Zone #1 (Chicago-Calumet)

Item		Size	Annual Usage In Units	Borden Label Unit Prices Week 5-8-65	Annual Value for Borden Label	A&P Label Unit Quotations	Annual Value for A & P Label	Annual Differential
Homo V.D. Milk	Glass	Gallons	999,752	$.6981	$697,927	$.6060	$605,850	$92,077
2%	Glass	Gallons	265,390	.6500	172,504	.5580	148,088	24,416
Homo V.D. Milk	Paper	Gallons	773,327	.7371	570,019	.6460	499,569	70,450
Homo V.D. Milk	Paper	½ "	5,321,403	.3685	1,960,937	.3230	1,718,813	242,124
Homo V.D. Milk	Paper	Qts.	2,194,591	.2000	438,918	.1755	385,151	53,767
Chocolate Milk	Paper	Qts.	163,037	.2437	39,732	.2178	35,509	4,223
Buttermilk	Paper	½ Gals.	331,344	.3685	122,100	.3050	101,060	21,040
Buttermilk	Paper	Qts.	542,083	.2000	108,417	.1600	86,733	21,684
2%	Paper	½ Gals.	612,231	.3453	211,403	.2990	183,057	28,346
Fortified Skim Milk	Paper	½ Gals.	515,996	.3453	178,173	.2825	145,769	32,404
Fortified Skim Milk	Paper	Qts.	415,587	.1917	85,419	.1500	66,838	18,581
Whipping Cream	Paper	½ Pts.	256,481	.3068	78,688	.2600	66,685	12,003
Half-Half	Paper	Pints	1,577,403	.2984	470,697	.2440	384,886	85,811
					$5,134,934		$4,428,008	$706,926

PROJECTED UNIT VOLUME - A&P ANNUAL FLUID MILK
VOLUME - INDIANA AND ILLINOIS PARTS
BORDEN ZONE I

Product			1 Projection Factor (1)	2 Points per Unit (Procedure-P,7)	3 Zone I Total Points	4 Zone I Total Units	5 Est.-Indiana Part - Zone I Points	6 Est.-Indiana Part - Zone I Units	Est.-Illinois Part - Zone I Units	LINE No.
Homo	Paper	Gallon		4	3,093,308	773,327	517,088	129,272	644,055	
"	"	½ Gallon		2	10,642,806	5,321,403	986,128	493,064	4,828,339	
"	"	Quart		1	2,194,591	2,194,591	97,431	97,431	2,097,160	
2%	"	½ Gallon		2	1,224,462	612,231	203,562	101,781	510,450	
Fort.Skim	"	½ "		2	1,031,992	515,996	42,432	21,216	494,780	
" "	"	Quart		1	445,587	445,587	11,371	11,371	434,216	
Buttermilk	"	½ Gallon		2	662,688	331,344	47,008	23,504	307,840	
"	"	Quart		1	542,083	542,083	29,276	29,276	512,807	
Choco Milk	"	"		1	163,037	163,037	10,400	10,400	152,637	
Half&Half	"	Pint		1	1,577,403	1,577,403	76,076	76,076	1,501,327	
Whip.Cream	"	½ Pint		1	256,481	256,481	14,109	14,109	242,372	
Sub Total - 11 Private Label Items			100.00		21,834,438		2,034,881			14
Homo	Glass	Gallon	18.32	4	3,999,008	999,752	372,790	93,198	906,554	16
2%	"	Gallon	4.86	4	1,061,560	265,390	98,895	49,448	215,942	
Half&Half	Paper-Quart		1.12	2	244,546	122,273	22,790	11,395	110,878	
Sour Cream-16 Oz.	Pint		1.67	2	364,636	182,318	33,982	16,991	165,327	
" " 8 Oz.	½Pint		1.81	1	395,203	395,203	36,831	36,831	358,372	
" Half&Half	Pint		1.62	1	353,718	353,718	32,965	32,965	320,753	
" Cream Dips -	8 Oz.		.50	1	109,172	109,172	10,174	10,174	98,998	
Yogurt	8 Oz.		.66	1	144,107	144,107	13,430	13,430	130,677	
Shakes	½Pint		.33	¼	72,054	288,216	6,715	26,860	261,356	
Wake Up	Pint		.36	1	78,604	78,604	7,326	7,326	71,278	
Tripple Whip	8 Oz.		.33	1	72,054	72,054	6,715	6,715	65,339	28

(1) See II-3

Computation	Line 14 X Col. 1 (Lines 16 → 28)	Col. 3 ÷ Col. 2	Line 14 X Col. 1 (Lines 16 → 28)	Col. 5 ÷ Col. 2	Col. 4 - Col. 6

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THE BORDEN COMPANY
CENTRAL DIVISION
ZONE NO. II - SOUTH BEND AREA

PRICES AS OF MAY 8, 1965

COMMODITY	YEARLY USAGE	BORDEN LABEL UNIT COST (ave.)	BORDEN LABEL ANNUAL COST		A & P LABEL UNIT COST	A & P LABEL ANNUAL COST	DIFFERENTIAL ANNUAL BASIS
Gals. Homo	129,272	$.6305	$ 81,501	3-Day	$.5848	$ 75,709	$ 5,792
				6-Day	.6248		
½ Gals. Homo	493,064	.3203	157,907	3-Day	.2924	144,575	13,332
				6-Day	.3124		
Qts. Homo	97,431	.1694	16,501	3-Day	.1612	15,748	753
				6-Day	.1712		
Qts. Chocolate	10,400	.2166	2,253	3-Day	.2057	2,142	111
				6-Day	.2157		
½ Gals. Buttermilk	23,504	.3193	7,505	3-Day	.2844	6,695	810
				6-Day	.3044		
Qts. Buttermilk	29,276	.1687	4,940	3-Day	.1467	4,303	637
				6-Day	.1567		
½ Gals. 2%	101,781	.2965	30,177	3-Day	.2714	27,705	2,472
				6-Day	.2914		
½ Gals. Skim	21,216	.2852	6,050	3-Day	.2634	5,593	457
				6-Day	.2834		
Qts. Skim	11,371	.1601	1,820	3-Day	.1347	1,536	284
				6-Day	.1447		
½ Pts. Whip Cream	14,109	.2555	3,605	3-Day	.2547	3,602	3
				6-Day	.2647		
Pts. Half-Half	76,076	.2465	18,755	3-Day	.2337	17,822	933
				6-Day	.2447		
TOTAL			$331,014			$305,430	$ 25,584

2,031,881 Pts / 13 = 156,400 / Person

.01257

R A+P X 103

PRICE ADJUSTMENT DEMONSTRATION - ZONE I
ADJUSTMENT OF PRICES (CX62) FROM RAW MILK PRICE
OF $4.29 PER CWT. TO RAW MILK PRICE OF $4.32 PER CWT.

PRODUCT	ZONE 1 UNIT PRICE @ $4.29 PER CX 62	ADJUSTMENT FOR $.03 PER CWT. (2)	PRICE @ $4.32 PER CWT.
Homo - Paper Gallon	.6220	.0028	.6248
" - " 1/2 Gallon	.3110	.0014	.3124
" - " Quart	.1705	.0007	.1712
2% Paper 1/2 Gallon	.2900	.0014	.2914
Fort. Skim " 1/2 "	.2820	.0014	.2834
" " " Quart	.1440	.0007	.1447
Buttermilk " 1/2 Gallon	.3030	.0014	.3044
" " Quart	.1560	.0007	.1567
Chocolate " "	.2150	.0007	.2157
Half & Half " Pint (1)	.2440	.0007	.2447
Whipping Cream" 1/2 Pint (1)	.2640	.0007	.2647

(1) Point values for pricing purposes - see procedure outline - milk pricing - A&P P 7.
(2) Price adjustment per $.01 per Cwt. change in price of raw milk from base price.

THE BORDEN COMPANY

CHICAGO - CALUMET AREA (ZONE NO. 1)

GENERAL QUOTATION - A & P PRIVATE LABEL

(Related to the Present Announced Superpool Class I Price of $4.29)

	Net for Borden Label	* Net for A & P Private Label
Homo V. D. Milk - Gal. Paper	$ .7371	$ .6220
Homo V. D. Milk - 1/2 Gal. Paper	.3685	.3110
Homo V. D. Milk - Qts. Paper	.2000	.1705
2% - Gal. Paper	.6906	.5800
2% - 1/2 Gal. Paper	.3453	.2900
Vitamin Fortified Skim - 1/2 Gal. Paper	.3453	.2820
Vitamin Fortified Skim - Qts. Paper	.1917	.1400
Half & Half - Pts. Paper	.2984	.2440
Chocolate Milk - Qts. Paper	.2437	.2150
Buttermilk - 1/2 Gal. Paper	.3685	.3030
Buttermilk - Qts. Paper	.2000	.1560
Whipping Cream - 1/2 Pts. Paper	.3068	.2640

* (1) Above net unit prices for A & P private label products are related to delivery conditions and cooperative program as set forth on the accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of $4.29 per cwt. indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit prices for A & P private label products are subject to change in connection with changes that occur in the cost of labor and containers.

B

969a

SCHEDULE OF POINTS USED TO COMPUTE PRICES

	Point Value
All Gallons Milk Products	4
All Half Gals. " "	2
All Quarts " "	1
1/2 Pints Whipping Cream	1
Pints Half & Half	1
Quarts Half & Half	2
8 oz. Sour Cream	1
16 oz. Sour Cream	2
Pint (16 oz.) Sour Half & Half	1
1/2 Pint (8 oz.) Sr. " "	1/2
8 oz. Sour Cream Dips	1
* 1/2 Pint Elsie Shakes	1/4
* 7 oz. Triple Whip	1
* 8 oz. Yogurt	1
* Pint Coffee Whitener	1
* 2 Lb. Cottage Cheese	2
* 1 Lb. Cottage Cheese	1
* 8 oz. Cottage Cheese	1/2
* 12 oz. Cottage Cheese	1
* Quart Egg Nog	1

*These products are not subject to market fluctuations of Class I Milk and are not on Class I formula pricing.

September 21, 1965

THE BORDEN COMPANY
Central Division

Price Change Per Unit Schedule

Increase or Decrease per CWT. in Class I Price	Resulting Increase or Decrease in Price Per Unit		
	Per Quart	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

D

RA+P X 104

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IV

BOWMAN COMPANY PRICES FOR BORDEN ZONE I

Class I Raw Milk = $4.32 per cwt.

This Computation Reflects The Lower Bowman Price in the Indiana Portion of Borden's Zone I, Where Bowman's Area 4 Price for 3 day per week Delivery Prevailed

PRODUCT	1 Illinois Portion, Borden Zone I Annual Quantity(1)	2 Price CX50 Areas1,2,3	3 Total Annual Price	4 Indiana Portion, Borden Zone I Annual Quantity(1)	5 Price CX50 Area 4	6 Total Annual Price	7 Total Annual Quantity (1)	8 Total Annual Price	10 Reference Line CX50 Exhibits A & D	Line No.
Homo-Paper Gallon	644,055	.6272	$ 403,951.29	129,272	.5984	$ 77,376.86	773,327	(Col.3&Col6)	4	
" 1/2 Gallon	4,828,339	.3136	1,514,167.11	493,064	.2993	147,574.05	5,321,403		2	
" Quart	2,097,160	.1696	355,678.33	97,431	.1624	15,822.79	2,194,591		1	
Sub-Total -Homo-3 Items			2,273,796.73			240,733.40		$2,514,530.13		
Golden Del)Paper ½ Gal.	510,450	.2944	150,276.48	101,781	.2801	28,508.86	612,231		19	
Skim " ½ "	494,780	.3008	148,829.82	21,216	.2865	6,078.38	515,996		17	
" " Quart	434,216	.1632	70,864.05	11,371	.1560	1,773.88	445,587		18	
Buttermilk " ½ Gal.	307,840	.3136	96,538.62	23,504	.2993	7,034.75	331,344		13	
" Quart	512,807	.1472	75,485.19	29,276	.1400	4,098.64	542,083		14	
Chocolate Milk " "	152,637	.2080	31,748.50	10,400	.2008	2,088.32	163,037		15	
Skim - Half " Pint	1,501,327	.2496	374,731.21	76,076	.2441	18,570.15	1,577,403		6	
Whipping Cream " ½ Pint	242,372	.2560	62,047.23	14,109	.2469	3,483.51	256,481		7	14
Sub Total - 8 Items			$1,010,521.10			$ 71,636.49		1,082,157.59		
Sub Total - 11 Items			3,284,317.83			312,369.89		3,596,687.72		
Homo-Glass Gallon	906,554	.5952	$ 539,580.94	93,198	.5719	$ 53,299.94	999,752	$ 592,880.88	3	17
Sub Total-Homogenized Milk 3.5% B.F.								$3,107,411.01		Line 4+17 1
Sub Total - 12 Items								$4,189,568.60		Line 14+19 2
Sour Cream - Pint	165,327	.4064	67,188.89	16,991	.3931	6,679.16	182,318		11	
" -½ Pint	358,372	.2080	74,541.38	36,831	.2039	7,509.84	395,203		12	
Sour ½ & ½ Pint	320,753	.2976	95,456.05	32,965	.2907	9,582.93	353,718		5	
Sour Cream Dip ½ Pint	98,998	.2800	27,719.44	10,174	.2709	2,756.14	109,172		21	
Dessert 8 oz.	130,677	.1728	22,580.99	13,430	.1637	2,198.49	144,107		20	
Milk Shake ½ Pint	261,356	.0768	20,085.96	26,860	.0753	2,022.56	288,216		16	
Skim Milk - Glass Gallon (2)	215,942	.5888	127,146.64	49,448	.5602	27,700.77	265,390		19	
Half & Half - Paper Quart (3)	110,878	.4992	55,350.30	11,395	.4882	5,563.04	122,273		6	
Boston Blend - Pints (4)	71,278	.1856	13,229.20	7,326	.1771	1,297.43	78,604		10	
"Quick Whip"Dispenser (5)	32,670	.3392	11,081.66	3,358	.3301	1,108.48	36,028		8	
"Reddi Whip"Dispenser (5)	32,669	.4550	14,864.40	3,357	.4459	1,496.87	36,026		9	
Sub Total-Products Offered By Bowman in Private Label or Bowman Label and by Borden in Borden Label Only			$ 529,244.91			$ 67,915.71		$ 597,160.62		33
								$4,786,729.22		Line 20+33 35

Total - 21 Fluid Milk Products Offered by Bowman Co.

(1) SEE UNIT VOLUME CALCULATION - II - 4

(2) OFFERED BY BORDEN IN GLASS GALLONS. BOWMAN PRICE FOR 2 PAPER HALF GALLONS USED FOR COMPUTATION

(3) PAPER QUART NOT OFFERED BY BOWMAN. BOWMAN PRICE FOR 2 PAPER ½ PINTS USED FOR COMPUTATION

(4) CONSIDERED COMPARABLE TO BORDEN'S "COFFEE WAKE-UP" PINTS

(5) CONSIDERED COMPARABLE TO BORDEN'S "TRIPLE WHIP". Each Product given equal weight in computation

A

N.E. 1

EXHIBIT A

9

B2-1 — METROPOLITAN CHICAGO - NORTHWESTERN AND NORTH CENTRAL ILLINOIS

STORE SERVICE SIX DAYS WEEKLY

	SCHEDULE I DIRECT COST FOR CHICAGO AREA PLANT	MARKUP *	NET PRICE AT CHICAGO AREA PLANT	DIRECT VANNING COST TO SALES AREA	Direct Cost of delivery per point	COMMISSION		NET DELIVERED PRICE SIX DAY BASIS	
QTS. HOMO. V.D.	.1307	.0081	.1388	.0025	.0206	.0082	1	.1676	
½ GAL. HOMO. V.D. (GLASS)									
½ GAL. HOMO. V.D. (PLST.)									
GAL. HOMO. V.D. - GLASS	.2390	.0119	.2509	.0051	.0412	.0164	2	.3136	
GAL. HOMO. V.D. - FIBER	.4402	.0252	.4654	.0146	.0824	.0328	3	.5932	
QTS. LOW-CAL	.4878	.0141	.5019	.0101	.0824	.0328	4	.6272	
PTS. SOURED HALF & HALF									
PTS. HALF & HALF	.2385	.0275	.2660	.0028	.0206	.0082	5	.2976	
QTS. RICH CREAM	.2014	.0180	.2194	.0014	.0206	.0082	6	.2496	
PTS. RICH CREAM									
½ PT. RICH CREAM									
QTS. WHIP CREAM									
½ PT. WHIP CREAM									
QUICK-WHIP DISPENSER	.2083	.0180	.2263	.0009	.0206	.0082	7	.2560	
AUTOMATIC DISPENSER	.3142	.0353	.3495	.0009	.0206	.0082	8	.3792	
3 OZ. CRM. CLSND - PTS.	.4078	.0178	.4253	.0009	.0206	.0082	9	.4550	
PTS. SOUR CREAM	.1445	.0109	.1554	.0014	.0206	.0082	10	.1856	
½ PTS. SOUR CREAM	.3001	.0375	.3376	.0112	.0412	.0164	11	.4064	
½ GAL. BUTTERMILK	.1486	.0250	.1736	.0056	.0206	.0082	12	.2080	
½ GAL. EGGNOG	.2259	.0250	.2509	.0051	.0412	.0164	13	.3136	
QTS. BUTTERMILK	.1003	.0156	.1159	.0025	.0206	.0082	14	.1472	
½ PTS. PAIL-NICK CARRY PACK	.1617	.0150	.1767	.0025	.0206	.0082	15	.2080	
½ PTS. CHOCOLATE SHAKE									
½ GAL. STA-FIT	.0591	.0095	.0686	.0009	.0057	.0021	16	.0774	
QT. STA-FIT	.2131	.0250	.2381	.0051	.0412	.0164	17	.3008	
½ GAL. 2%	.1163	.0156	.1319	.0025	.0206	.0082	18	.1632	
YOGURT (Plain & Strawberry)	.2106	.0211	.2317	.0051	.0412	.0164	19	.2944	
SNACK DIP - 8 OZ.	.1425	.0006	.1431	.0009	.0206	.0082	20	.1728	
	.2458	.0045	.2503	.0009	.0206	.0082	21	.2800	

CLASS I PRICE - 4.32 per CWT.

* Overhead & profit. (appears OK)

REFERENCE LINE

#36 — 8/21/65

EXHIBIT 6

923a

NET PRICES-INDIANA AREA

STORE SERVICE THREE DAYS WEEKLY

	Schedule 1 Direct Cost F.O.B. Chicago Area Plant	Markup	Net Price at Chicago Area Plant	Direct Vanning Cost to Sales Area	Direct Cost of delivery per point	Commission	Net Delivered Price-Three Days Weekly	
QTS. HOMO. V.D.	.1303	.0081	.1384	.0206	.0134	.0052	.1624	P.
1/2 GAL. HOMO. V.D. (GLASS)								
1/2 GAL. HOMO. V.D. (FIBER)	.2392	.0119	.2509	.0112	.0268	.0134	.2903	PL
GAL. HOMO. V.D.- GLASS	.1503	.0252	.1654	.0331	.0536	.0268	.2789	
GAL. HOMO. V.D.- FIBER	.1825	.0101	.5019	.0321	.0536	.0268	.5719	
QTS. LOW-CAL							.5984	P.
PTS. SOURED HALF & HALF	.2385	.0235	.2663	.0061	.0134	.0052	.2927	
PTS. HALF & HALF	.2014	.0150	.2194	.0061	.0134	.0052	.2441	PL
QTS. RICH CREAM								
PTS. RICH CREAM								
1/2 PT. RICH CREAM								
QTS. WHIP. CREAM								
1/2 PT. WHIP. CREAM	.2083	.0180	.2263	.0020	.0134	.0052	.2469	PL
QUICK-WHIP DISPENSER	.2763	.0252	.3095	.0020	.0134	.0052	.3301	
100 SHOT DISPENSER	.1625	.0178	.1853	.0020	.0134	.0052	.2059	
13 OUNCE BLEND - PTS	.1415	.0109	.1584	.0031	.0134	.0052	.1801	
PTS. SOUR CREAM	.3001	.0325	.3396	.0183	.0268	.0104	.3951	
1/2 PTS. SOUR CREAM	.1486	.0250	.1736	.0117	.0134	.0052	.1939	
1/2 GAL. BUTTERMILK	.2257	.0050	.2509	.0112	.0268	.0104	.2993	PL
QTS. BUTTERMILK	.1002	.0156	.1159	.0055	.0134	.0052	.1400	PL
QTS. DAIRI-RICH	.1617	.0150	.1767	.0055	.0134	.0052	.2008	PL
1/2 PTS. DAIRI-RICH CARRY PACK								
1/2 PTS. CHOCOLATE SHAKE	.0591	.0095	.0686	.0020	.0134	.0052	.0753	
1/2 GAL. STA-FIT	.3131	.0290	.3421	.0112	.0268	.0104	.3905	PL
QT. STA-FIT	.1153	.0166	.1319	.0055	.0134	.0052	.1560	PL
1/2 GAL. 2%	.2106	.0211	.2317	.0112	.0268	.0104	.2801	PL
YOGURT (Plain & Strawberry)	.1425	.0206	.1631	.0020	.0134	.0052	.1837	
BUTTER QTR - 8 OZ.	.2450	.0053	.2503	.0020	.0134	.0052	.2709	

21 items

CLASS I PRICE — 4.32 per CWT.

(REFERENCE LINE)

9-14-65

THE BORDEN COMPANY
Central Division

Estimated Annual Quotation Differentials - Zone #1 (Chicago-Calumet)

Item	Size	Annual Usage In Units	Borden Label Unit Prices Week 5-8-65	Annual Value for Borden Label	A&P Label Unit Quotations	Annual Value for A & P Label	Annual Differential
Homo V.D. Milk	Glass Gallons	999,752	$.6981	$697,927	$.6060	$605,850	$92,077
2%	Glass Gallons	265,390	.6500	172,504	.5580	148,088	24,416
Homo V.D. Milk	Paper Gallons	773,327	.7371	570,019	.6460	499,569	70,450
Homo V.D. Milk	Paper ½ "	5,321,403	.3685	1,960,937	.3230	1,718,813	242,124
Homo V.D. Milk	Paper Qts.	2,194,591	.2000	438,918	.1755	385,151	53,767
Chocolate Milk	Paper Qts.	163,037	.2437	39,732	.2178	35,509	4,223
Buttermilk	Paper ½ Gals.	331,344	.3685	122,100	.3050	101,060	21,040
Buttermilk	Paper Qts.	542,083	.2000	108,417	.1600	86,733	21,684
2%	Paper ½ Gals.	612,231	.3453	211,403	.2990	183,057	28,346
Fortified Skim Milk	Paper ½ Gals.	515,996	.3453	178,173	.2825	145,769	32,404
Fortified Skim Milk	Paper Qts.	445,587	.1917	85,419	.1500	66,838	18,581
Whipping Cream	Paper ½ Pts.	256,481	.3068	78,688	.2600	66,685	12,003
Half-Half	Paper Pints	1,577,403	.2984	470,697	.2440	384,886	85,811
Total				$5,134,934		$4,428,008	$706,926

BORDEN COMPANY PRICES TO AVP FOR FLUID MILK ITEMS
EQUIVALENT TO FLUID MILK ITEMS OFFERED BY BOWMAN CO. (CX-50)
in BORDEN ZONE I

PRODUCT	1 Annual Quantity(1)	2 Borden Company Price CX62c @$4.52/ Cwt (2)	3 Borden Company Price CX5c @$4.32/ Cwt	4 Borden Company Price A&P Billings, Chicago & SUBURBS, Sept. 1965(5)	5 Price Compares with Bowman Price	6 Total Annual Price Col. 1xCol. 5	7 TO SUMMARY PAGE	8 SOURCE OF COMPUTATION	LINE No.
Homo - Paper Gallon	773,327	.6248	.6460	.7371	.6248	483,174.70			1
" " 1/2 Gallon	5,321,403	.3124	.3230	.3685	.3124	1,662,406.29			2
" " Quart	2,194,591	.1712	.1755	.2000	.1712	375,713.97			3
Sub Total - Homo - Paper - 3 Items						2,521,294.96	2,521,294.96	Lines 1 → 3	4
Adjustment to 3.5% B.F. (4)						25,345.75	25,345.75		5
Homo Milk, Adjusted @ 3.5% B.F.						2,546,640.71	2,546,640.71	Lines 4 + 5	6
" Paper 1/2 Gallon	612,231	.2914	.2990	.3453	.2914	178,404.11			7
Fort. Skim " 1/2 "	515,996	.2834	.2825	.3451	.2834	146,233.26			8
" " " Quart	445,587	.1447	.1500	.1917	.1447	64,476.48			9
Buttermilk " 1/2 Gallon	331,344	.3044	.3050	.3935	.3044	100,861.11			10
" Quart	542,582	.1567	.1600	.2000	.1567	84,944.41			11
Chocolate " " "	163,037	.2157	.2178	.2437	.2157	35,167.08			12
Fortified Half " Pint	1,577,403	.2447	.2440	.2904	.2447	385,950.51			13
Whipping Cream " 1/2 Pint	256,461	.2647	.2600	.3068	.2647	67,890.52			14
Sub Total - 8 Additional Items Offered in Private Label						1,063,967.48	1,063,967.48	Lines 7 → 14	15
Sub Total - 11 Items, Homo. @ 3.5% B.F.						3,610,608.19	3,610,608.19	Lines 6 + 15	16
Skim - Glass Gallon	909,752	N.A.	.6060(3)	.6961	.6961	697,926.87	697,926.87		17
Adjustment to 3.5% B.F. (4)						6,242.45			18
Skim - Glass Gallons - @ 3.5% B.F.						704,169.32	704,169.32	Lines 17 + 18	19
Total, Homogenized Milk @ 3.5% B.F.						3,250,810.03	3,250,810.03	Lines 6 + 19	20
Sour Cream - 16 oz. Pint	182,310	N.A.	N.A.	.4915	.4915	89,609.30			21
" " - 8 oz. 1/2 Pint	395,203	N.A.	N.A.	.2474	.2474	97,773.22			
Dairy Dip Pint	353,718	N.A.	N.A.	.3574	.3574	126,460.30			
Sour Cream Dip-8 oz. 1/2 Pint	109,172	N.A.	N.A.	.2947	.2947	32,172.99			
Yogurt 8 oz.	144,107	N.A.	N.A.	.2036	.2036	29,343.01			
Milk Shake 1/2 Pint	283,215	N.A.	N.A.	.0930	.0930	26,334.09			
Buttermilk - Glass Gallons	265,390	N.A.	.5500(3)	.6500	.6500	172,503.50			
Half & Half Paper Quart	122,273	N.A.	N.A.	.5895	.5895	72,079.92			
"Dairy Dip"	78,604	N.A.	N.A.	.2108	.2108	16,569.72			
"Whipple Whip"	72,054	N.A.	N.A.	.4089	.4089	29,462.88			30
Sub Total - 10 Items Offered only in Borden Label						692,850.94	692,850.94	Lines 21 → 30	32
TOTAL - 32 Fluid Milk Items						5,007,628.45	5,007,628.45	Lines 15 + 20 + 32 = 16 + 19 + 32	

(1) See Unit Volume Calculation - Case and Company Calculation II-4
(2) See Price Adjustment Demonstration - III
(3) Reduced Prices on these items were withdrawn when prices on certain private label items in paper were reduced.
(4) See Calculation of Butterfat Adjustment - V-2
(5) See Billing Summary for Week Ending 9/11/65
N.A. Not Available

CALCULATION OF BUTTERFAT ADJUSTMENT, ZONE I

Column Number Product	(1) Annual Unit Usage, Zone I CX62C & 56C	(2) Quarts Per Unit	(3) Total Quarts (1)x(2)	(4) Value Per Quart of 0.1% B.F.(1)	(5) Annual Val. of Butterfat
Homo - Paper Gal.	773,327	4	3,093,308		
" " ½ Gal.	5,321,403	2	10,642,806		
" " Quart	2,194,591	1	2,194,591		
" " Total			15,930,705	$.001591	$25,345.75
Homo - Glass Gal.	999,752	4	3,999,008	$.001591	$ 6,242.45

(1) CX62 : Value of 0.1% B.F. per 100 Lbs. Raw Milk = $.0740

Weight of One Quart Homo = 2.15 lb.

∴Value of 0.1% B.F. in One Quart is

$$\frac{2.15 \text{ lbs.}}{100.0 \text{ lbs.}} = \frac{X}{\$.0740}$$

$$X = \frac{2.15}{100} (.0740)$$

$$= \$.001591$$

B

Schedule #1

FORMULA PRICE FOR RAW MILK

	Per Hundred Pounds
Producer Price - 3.5% B.F.	$ 4.2900
Market Administrator's Fee	.0200
Shrinkage 1%	.0045
Procurement, Bulk Tank Premiums Association Fees, Inner Zone Premiums, etc.	.2500
Total Cost of 3.5% Raw Milk F.O.B. Our Plant	$ 4.5645
To 3.4% B.F. Finished Product	.0740
Cost of 3.4% Finished Product	$ 4.4905

MILK COST BY ITEMS

Quart	2.15 pounds x $4.4905 per cwt.	=	$ .0966
Half Gallon	4.30 pounds x $4.4905 per cwt.	=	.1931
Gallon	8.60 pounds x $4.4905 per cwt.	=	.3862

978a

THE BORDEN COMPANY
Central Division

9-14-65

EX 56 C

Estimated Annual Quotation Differentials - Zone #1 (Chicago-Calumet)

Item	Size	Annual Usage In Units	Borden Label Unit Prices Week 5-8-65	Annual Value for Borden Label	A&P Label Unit Quotations	Annual Value for A & P Label	Annual Differential
Homo V.D. Milk Glass	Gallons	999,752	$.6981	$697,927	$.6060	$605,850	$92,077
2% Glass	Gallons	265,390	.6500	172,504	.5580	148,088	24,416
Homo V.D. Milk Paper	Gallons	773,327	.7371	570,019	.6460	499,569	70,450
Homo V.D. Milk Paper	½ "	5,321,403	.3685	1,960,937	.3230	1,718,813	242,124
Homo V.D. Milk Paper	Qts.	2,194,591	.2000	438,918	.1755	385,151	53,767
Chocolate Milk Paper	Qts.	163,037	.2437	39,732	.2178	35,509	4,223
Buttermilk Paper	½ Gals.	331,344	.3685	122,100	.3050	101,060	21,040
Buttermilk Paper	Qts.	542,083	.2000	108,417	.1600	86,733	21,684
2% Paper	½ Gals.	612,231	.3453	211,403	.2990	183,057	28,346
Fortified Skim Milk Paper	½ Gals.	515,996	.3453	178,173	.2825	145,769	32,404
Fortified Skim Milk Paper	Qts.	415,587	.1917	85,419	.1500	66,838	18,581
Whipping Cream Paper	½ Pts.	256,481	.3068	78,688	.2600	66,685	12,003
Half-Half Paper	Pints	1,577,403	.2984	470,697	.2440	384,886	85,811
Total				$5,134,934		$4,428,008	$706,926

979a

CENTRAL DIVISION
ZONE NO. I - CHICAGO AND CALUMET AREA

(E)
CX. 62C

COMMODITY	YEARLY USAGE	BORDEN LABEL UNIT COST	BORDEN LABEL ANNUAL COST	A & P LABEL UNIT COST	A & P LABEL ANNUAL COST	DIFFERENTIAL ANNUAL BASIS
Gals. Homo Paper	773,327	$.7371	$ 570,024	$.6220	$ 481,009	$ 89,015
½ Gals. Homo	5,321,403	.3685	1,960,937	.3110	1,654,956	305,981
Qts. Homo	2,194,591	.2000	438,915	.1705	374,178	64,737
Qts. Chocolate	163,037	.2437	39,728	.2150	35,053	4,675
½ Gals. Buttermilk	331,344	.3685	122,096	.3030	100,397	21,699
Qts. Buttermilk	542,083	.2000	108,420	.1560	84,565	23,855
½ Gals. 2%	612,231	.3453	211,397	.2900	177,547	33,850
½ Gals. Skim	515,996	.3453	178,169	.2820	145,511	32,658
Qts. Skim	445,587	.1917	85,419	.1440	64,165	21,254
½ Pts. Whip Cream	256,481	.3068	78,693	.2640	67,711	10,982
Pts. Half-Half	1,577,403	.2984	470,704	.2440	384,886	85,818
TOTAL			$4,264,502		$3,569,978	$694,524

21,831,138 Qts.

RPT. 108
3/28/74

ESTIMATED AVERAGE MONTHLY LIST PRICE VALUE OF
A&P FLUID MILK LINE PURCHASED FROM BORDEN
IN AREA COVERED BY BOWMAN CO. BID (CX50)

LINE NO.		TOTAL A&P VOLUME, 6TH PERIOD END. 6/26	NUMBER OF 4 WEEK PERIODS/YR.	EST. ANNUAL VOLUME
2	CHICAGO METROPOLITAN	3,356,722(1)	13	43,637,386
4	EASTERN IOWA - CENTRAL ILLINOIS	743,085(1)	13	9,660,105
6	TOTAL	4,099,807	13	53,297,491
10	WEIGHTED AVERAGE BOWMAN LIST PRICE PER POINT(2)			$ .25745
13	ESTIMATED ANNUAL VALUE(3)			$13,721,439
17	ESTIMATED AVERAGE MONTHLY VALUE(4)			$ 1,143,453

(1) SOURCE - CX42D

(2) PRICES IN CX50D EXTENDED BY ANNUALIZED QUANTITIES FOR ZONES I. TOTAL LIST PRICE VALUE DIVIDED BY POINT VOLUME (SEE CALCULATION ATTACHED) I-2

(3) LINE 6 x LINE 10

(4) LINE 13 ÷ 12

FEDERAL TRADE COMMISSION
Docket No. 8826 Rejected COMMISSION RESPONDENT Exhibit No. 108-A
In the Matter of A&P Tea Co.
Date 3/28 Witness _____ Reporter JA

A

8/16/65

THE BORDEN COMPANY
CENTRAL DIVISION

DATA - RE: A & P SALES - FLUID MILK
BASED ON 6TH PERIOD ENDED JUNE 26

(1) Percentage of A & P Sales to Total Sales - Central Division - Points Sold

Region	Total A&P Volume	Central Division Sales: Grand Total	Central Division Sales: Wholesale Rte. Sales Only	Percent of A&P Sales: To: Grand Total	Percent of A&P Sales: To: Wholesale Rte. Sales
Chicago Metropolitan	3,356,772	13,291,969	(1)6,027,418	25.2	55.7
Eastern Iowa-Central Illinois	743,085	4,248,423	2,580,398	17.5	28.8
Western Iowa	9,618	3,254,249	771,840	.3	1.2
Wisconsin	851,751	8,755,366	3,536,438	9.7	24.1
Grand Total	4,961,226	29,550,007	12,916,094	16.8	38.4

(1) Excludes bulk route sales of 1,209,267 points.

(2) Percentage of A & P Sales Produced at Woodstock to Total Woodstock Production - Points

Total A & P Sales Produced --

Total Wood--

MILK AND ICE CREAM OPERATING STATEMENT

982a

RECEIVED NOV 14 1962

N: Chicago Metropolitan MILK [ ] ICE CREAM [ ] MONTH: Period #6, 196

INCL. HARRIS MONTH 4 Weeks Ended 6/16/65

(CENTS OMITTED)	THIS YEAR		LAST YEAR		INCR. (DECR.)		MONTHLY OBJECTIVE	
ES VOLUME	13,791,969		14,040,417		(248,448)			
	AMOUNT	PER UNIT	AMOUNT	PER UNIT	AMOUNT	PER UNIT	AMOUNT	PER UNIT
T SALES VALUE	2,494,394	.1809	2,596,963	.1850	(157,569)	(.0041)		
st of Products Sold	1,794,778	.1313	1,877,618	.1338	(77,390)	(.0025)		
OSS PROFIT ON SALES	699,166	.0506	719,345	.0512	(19,179)	(.0006)		
dvertising Expense	79,764	.0058	76,118	.0054	3,144	.0003		
redit and Collection								
illing Expense								
elivery Expense	597,760	.0431	645,603	.0446	(47,843)	(.0015)		
abinet Svc. Expense								
dministrative Expense	7,939	.0006	30,654	.0021	(22,695)	(.0015)		
TOTAL EXPENSES	684,961	.0496	752,375	.0536	(67,394)	(.0040)		
Tel. Profit before Taxes	94,163	.0071	91,970	.0066	2,193	.0005		
er Inc. & (Deductions)	(5,467)	(.0004)	(1,356)	(.0001)	(3,966)	(.0003)		
ome before Tax	88,696	.0067	90,614	.0065	(1,691)	.0002		
deral Income Tax	40,513	.0031	42,194	.0031	(1,681)	-		
OME FROM TRADING (PL-110)	47,910	.0036	47,970	.0034	(10)	.0002		

	YEAR TO DATE						OBJECTIVE FOR YEA
ES VOLUME	90,891,543		95,446,683		(3,443,158)		
T SALES VALUE	16,609,938	.1845	17,717,155	.1841	(607,990)	.0004	
ost of Products Sold	11,917,168	.1323	11,977,994	.1313	(36,111)	.0010	
OSS PROFIT ON SALES	4,692,770	.0522	4,739,161	.0528	(53,879)	(.0006)	
dvertising Expense	160,656	.0018	173,769	.0019	(13,046)	(.0001)	
redit and Collection							
illing Expense	—						
elivery Expense	3,940,949	.0434	3,939,435	.0426	(96,486)	.0008	
abinet Svc. Expense							
dministrative Expense	176,347	.0019	208,769	.0023	(38,477)	(.0004)	
TOTAL EXPENSES	14,771,947	.0849	14,371,964	.0868	(189,959)	(.0019)	
otal Profit before Taxes	475,603	.0053	567,495	.0060	(87,150)	(.0007)	
ner Inc & (Deductions)	(77,954)	(.0003)	(15,539)	(.0002)	(17,415)	(.0001)	
come before Tax	447,649	.0050	547,956	.0058	(99,363)	(.0008)	
deral Income Tax	206,011	.0023	237,733	.0027	(31,717)	(.0004)	
OME FROM TRADING (PL-110)	241,638	.0027	290,131	.0031	(48,793)	(.0004)	

MEMO	MONTH				YEAR TO DATE			OBJECTI
U Statistics	This Year	Last Year	Incr. (Decr.)	Objective	This Year	Last Year	Incr. (Decr.)	FOR YE
w Materials & Ingred.	.0969	.0997	(.0003)		.0903	.0917	(.0014)	
kg. Mat'ls. & Cont. Exp.	.0126	.0122	.0004		.0156	.0156	-	
oduction Expense	.0134	.0158	(.0024)		.0143	.0148	-	
ansport Costs	.0177	.0093	.0077		.0108	.0097	.0011	

COMMENTS:

	Accruals to Date		Payments to Date	
	This year	Last year	This year	Last year
Public Liability	# 27,456.00	$ 27,456.00	# 6981.77	$ 5,332.58
Property Liability	3,293.00	3,293.00	430.50	163.20
Workmen's Compensation	21,350.00	21,350.00	15,646.90	14,756.39

FEDERAL TRADE COMMISSION
RECEIVED
Docket No. 9208 Respondent's Exhibit No. 1-24

983a

FOR COMPARISON OF BOWMAN/BORDEN BIDS

I-2

CHICAGO & SUBURBS BILLING SUMMARIES (1)

LINE NO.		ANNUAL UNITS	POINT VALUE	ANNUAL POINTS		TOTAL POINTS 4 WKS.END 5/29/65	% OF INDEX VALUE	TOTAL POINTS 4 WKS.END 9/25/65	% OF INDEX VALUE	AVE. INDEX VALUE POINTS	ANNUAL POINTS	ANNUAL UNITS	LIST PRICE EXCOD	ANNUAL LIST VALUE
	HOMO - PAPER GALLON	773,327	4	3,093,308	11.97	178,672	11.44	185,160	11.76			773,327	.98	757,860.46
	½ GALLON	5,321,403	2	10,642,806	41.20	621,544	39.79	648,150	41.18			5,321,403	.49	2,607,487.40
	QUART	2,194,591	1	2,194,591	8.50	146,986	9.41	151,176	9.60			2,194,591	.265	581,726.61
	SUB TOTAL			15,930,706	61.67	947,202	60.64	984,486	62.54					
	2% - (GOLDEN DEL)													
	½ GALLON	612,231	2	1,224,462	4.73	76,188	4.88	76,494	4.86			612,231	.46	281,626.26
	FORT.SKIM ½ GALLON	515,996	2	1,031,992	3.99	68,700	4.40	63,138	4.01			515,996	.47	242,518.12
	QUART	445,587	1	445,587	1.73	32,432	2.08	29,711	1.89			445,587	.225	113,831.68
	BUTTERMILK ½ GALLON	331,344	2	662,688	2.58	40,536	2.60	33,494	2.13			331,344	.49	162,358.56
	QUART	542,083	1	542,083	2.10	36,539	2.34	31,520	2.00			542,083	.23	124,[illegible]
	CHOCO. MILK QUART	163,037	1	163,037	.63	10,268	.65	13,818	.88			163,037	.325	59,[illegible]
	HALF & HALF PINT	1,577,403	1	1,577,403	6.10	99,011	6.34	96,573	6.13			1,577,403	.39	615,187.17
	WH. CREAM ½ PINT	256,481	1	256,481	.99	18,648	1.19	11,281	.72			256,481	.40	102,592.40
	8 ITEM SUB TOTAL			5,903,733	22.85	382,330	24.48	356,029	22.62					
15	11 ITEM SUB TOTAL			21,834,441	84.52	1,329,543	85.12	1,340,515	85.16		21,834,441		.2411	5,642,407.74
17	HOMO - GLASS GALLON	999,752	4	3,999,008	15.48	232,424	14.88	233,624	14.84			999,752	.93	929,769.36
18	SUB TOTAL LINE 15 & 17			25,833,449	100.00%	1,561,967	100.00	1,574,139	100.00	100.00	25,833,449	---		6,572,257.14
19	2% - (GOLDEN DEL)													
	GLASS GALLON	265,390	4	1,061,560	4.11	63,100	4.04	60,716	3.86	4.11	1,061,560	265,390	.92	244,158.80
20	HALF & HALF, QUART PAPER	NOT GIVEN	2			8,734	.56	7,376	.47	.58	149,834	74,917	.78	58,435.63
21	SOUR CREAM, PT.(16 OZ.)	" "	2			25,340	1.62	22,464	1.43	1.51	390,088	195,044	.635	123,852.30
22	" " ½ PT.(8 OZ.)	" "	1			27,953	1.78	24,038	1.53	1.65	426,252	426,252	.325	138,531.90
23	HALF & HALF QUART	" "	2			25,768	1.66	20,670	1.31	1.44	372,002	186,001	.465	86,490.47
24	SOUR CREAM DIPS (8 OZ.)	" "	1			8,728	.56	5,737	.36	.46	118,834	118,834	.40	47,533.60
25	YOGURT	" "	1			10,568	.68	8,344	.53	.54	139,501	139,501	.27	37,665.27
26	SHAKES ½ PINT	" "	½			--	--	9,375	.60	.30	77,500	310,000	.12	37,200.00
	SUB TOTAL LINES 19-26					170,191	10.90	158,020	10.09			1,715,939		773,535.97
	TRIPLE WHIP, 8 OZ.	NOT GIVEN	1			6,306	.40	3,216	.20	.30	77,500	77,500	.53	41,075.00
	WAKE UP PINT	" "	2			6,694	.43	3,742	.24	.33	85,250	42,625	.29	12,361.25
	CHOCO. SKIM, ½ GALLON	NOT GIVEN	2			10,704	.69	9,890	.63	.66	170,501	85,251	.46	39,215.46
	CHOCO. ½ PT. HANDI PAKS	" "	½			2,020	.13	1,205	.08	.12	31,000	124,000	.085	10,540.00
	(1) SEE I-3										28,933,268			7,448,984.72

Average List Price Per Point .25745

FEDERAL TRADE COMMISSION
Docket No. 8756 COMMISSION
RESPONDENT EXHIBIT No. 168-D

D

VOLUME OF MAP FLUID MILK ITEMS - CHICAGO & SUBURBS - 1965
(EXCLUDING [illegible])

	Points/ Unit P.7 Procedures Outline	5/8	5/15	5/22	5/29	Total for May	Total Points Col.1x6 May	9/4	9/11	9/18	9/25	Total for September	Total Points Col.(1)x(12)	LINE NO.
Home-Paper-Gallon	4	11,338	10,052	10,999	11,479	44,868	179,472	12,478	10,845	11,296	11,671	46,290	185,160	
-½ Gallon	2	78,614	75,078	76,163	80,117	310,772	621,544	89,681	73,548	79,493	81,353	324,075	648,150	
-Quart	1	37,454	36,160	36,317	37,055	146,986	146,986	41,068	34,174	37,617	38,317	151,176	151,176	
Sub-Total						502,426						521,541		
2%+(Golden Del)½ Gallon	2	9,600	9,350	9,310	9,736	38,094	76,188	10,426	8,937	9,456	9,428	38,247	76,494	
Fort. Skim - ½ Gallon	2	8,847	8,425	8,439	8,643	34,354	68,708	8,355	7,299	7,894	8,021	31,569	63,138	
- Quart	1	8,574	7,995	7,648	8,215	32,432	32,432	7,039	6,997	7,234	7,641	29,711	29,711	
Buttermilk ½ Gallon	2	5,197	5,245	4,908	4,918	20,269	40,536	4,071	4,086	4,087	4,503	16,747	33,494	
Quart	1	9,504	9,226	8,889	8,920	36,539	36,539	8,224	7,385	7,726	8,185	31,520	31,520	
Choco.Milk Quart	1	2,614	2,593	2,458	2,603	10,268	10,268	3,111	5,301	2,556	2,650	13,818	13,818	
Half & Half Pint	1	24,838	24,014	23,709	26,450	99,011	99,011	26,935	22,323	23,659	23,666	96,573	96,573	
Wh. Cream ½ Pint	1	4,213	3,097	4,278	6,260	18,648	18,648	3,144	2,517	2,850	2,770	11,281	11,281	
8 Item Sub-Total						10,648						269,466		
11 Item Sub-Total						289,614								
						792,040								
Home-Glass-Gallon	4	14,739	14,320	14,270	14,777	58,106	232,424	15,602	13,628	14,664	14,512	58,406	233,624	15
Sub-Total Line 15 & Line 17						850,146								
2%(Golden Del)Glass Gallon	4	4,096	3,851	3,884	3,944	15,775	63,100	4,088	3,564	3,802	3,725	15,179	60,716	17
Half & Half, Quart Paper	2	1,069	1,040	1,116	1,142	4,367	8,734	983	879	904	922	3,688	7,376	19
Sour Cream -Pt. (16 oz.)	2	2,974	2,983	3,049	3,664	12,670	25,340	3,251	2,727	2,630	2,624	11,232	22,464	20
" ½ Pt. (8 oz.)	1	6,579	6,463	6,996	7,915	27,953	27,953	6,843	5,610	5,773	5,812	24,038	24,038	21
" Half & Half - Pt.	2	2,922	3,046	3,146	3,770	12,884	25,768	3,150	2,593	2,360	2,232	10,335	20,670	22
Sour Cream Dips-(8 oz.)	1	1,479	1,460	1,494	1,695	6,728	6,728	1,763	1,275	1,330	1,369	5,737	5,737	23
Yogurt	1	2,700	2,599	2,675	2,594	10,568	10,568	2,197	1,909	2,188	2,050	8,344	8,344	24
Shikesu 1/2 Pint	½	-	-	-	-	-	-	9,153	6,664	14,547	7,535	37,899	9,475	25
Sub Total Line 19-26						92,945						116,452		26
Triple Whip 8 oz	1	2,762	671	1,216	1,657	6,306	6,306	902	621	706	987	3,216	3,216	
Wake Up Pint	2	766	708	835	1,013	3,322	6,644	623	427	449	372	1,871	3,742	
Choco.Skim - ½ Gal	2	1,315	1,327	1,341	1,369	5,352	10,704	1,310	1,112	1,227	1,296	4,945	9,890	
Choco ½ Pint Handi Paks	½	2,030	2,060	2,015	1,936	8,081	2,020	1,207	1,005	1,281	1,328	4,821	1,205	

985a

SCHEDULE OF POINTS USED TO COMPUTE PRICES

	Point Value
All Gallons Milk Products	4
All Half Gals. " "	2
All Quarts " "	1
1/2 Pints Whipping Cream	1
Pints Half & Half	1
Quarts Half & Half	2
8 oz. Sour Cream	1
16 oz. Sour Cream	2
Pint (16 oz.) Sour Half & Half	1
1/2 Pint (8 oz.) Sr. " "	1/2
8 oz. Sour Cream Dips	1
* 1/2 Pint Elsie Shakes	1/4
* 7 oz. Triple Whip	1
* 8 oz. Yogurt	1
* Pint Coffee Whitener	1
* 2 Lb. Cottage Cheese	2
* 1 Lb. Cottage Cheese	1
* 8 oz. Cottage Cheese	1/2
* 12 oz. Cottage Cheese	1
* Quart Egg Nog	1

*These products are not subject to market fluctuations of Class I Milk and are not on Class I formula pricing.

FEDERAL TRADE COMMISSION
DOCKET NO. 9147 COMPLAINT EXHIBIT NO. 221-F

221

F

Borden Dock Price

f.o.b. Woodstock, Ill.

and

Estimated Store Delivered Costs, using Eagle employed contract carrier or Eagle's own transport equipment to stores located in the Joliet, Peru, Plano, Morris and Princeton areas.

(1) It is up to Eagle as the buyer at Borden's dock to arrange for the transportation to its stores. Contract carriers are available for this purpose.

(2) We believe that one such contract carrier has the transportation service available on the following basis:

(a) Delivery Schedule - 3 Day Basis.

(b) Rate: 32¢ per mile, plus 8¢ per case.

(c) Estimated Cost:

900 Miles at 32¢ per mile	=	$288.00
2100 cases @ 8¢ per case	=	168.00
Trailer		60.00
Tolls, etc.		26.00
Total		$542.00
Average Cost Per Point		.0109
Average Cost per 1/2 Gallon		.0218

(d) Applying the average cost per point shown under (c) above, it is estimated that the unit cost delivered to the stores listed below would approximate the figures shown, under Column 2 of the following schedule

(e) It may well be that Eagle as a dock purchaser may arrange a delivery cost from a different carrier at a lesser cost.

(f) Stores included in Estimated Costs (item c above)

#33 Joliet

#34 Morris

#39 Princeton

#158 Plano

#227 Peru

9/12/68

SCHEDULE SHOWING DOCK PRICES (F. O. B. PEKIN, ILLINOIS)

AND

ESTIMATED STORE DELIVERED COSTS USING EAGLE EMPLOYED CONTRACT CARRIER OR EAGLE'S OWN TRANSPORT EQUIPMENT

Product	Size	Point Value	Dock Price F. O. B. Pekin, Illinois	Estimated Store Delivery Cost (1)	Present Prices
Food Club					
Homo Milk 3. 3% B. F.	Gallon	4	$ .6496	$ .6940	$ .7340
Homo Milk 3. 3% B. F.	1/2 Gal.	2	.3238	.3460	.3670
2%	Gallon	4	.5996	.6440	.6785
2%	1/2Gal.	2	.2988	.3210	.3393
Fortified Skim	1/2Gal.	2	.2499	.2721	.2987
Half & Half	Pint	1	.1851	.1962	.2347
Cottage Cheese	Lb.	1	.2289	.2400	.2524
" "	2 #	2	.4324	4546	
Borden Label					
Homo Milk-Glass 3. 3% B. F.	Gallon	4	.6397	.6840	.7144
Homo Milk-Paper 3. 3% B. F.	Gallon	4	.6596	.7040	.7540
Homo Milk 3. 3% B. F.	1/2Gal.	2	.3288	.3510	.3770
Homo Milk 3. 3% B. F.	Quart	1	.1760	.1871	.1900
2%	Gallon	4	.6096	.6540	.6985
2%	1/2Gal.	2	.3038	.3260	.3493
Chocolate Milk	Quart	1	.2045	.2156	.2098
Chocolate Skim	1/2Gal.	2	.2898	.3120	-
Fortified Skim	1/2Gal.	2	.2549	.2771	.3087
Fortified Skim	Quart	1	.1334	.1445	.1553
Buttermilk	1/2Gal.	2	.2683	.2905	.3522
Buttermilk	Quart	1	.1371	.1482	.1771
Half & Half	Quart	2	.3665	.3887	-
Half & Half	Pint	1	.1876	.1987	.2397
Whipping Cream	1/2Pint	1	.1963	.2074	.2296
Sour Cream	16 oz.	2	.3099	.3321	-
Sour Cream	8 oz.	1	.1695	.1806	.2177
Sour Half & Half	16 oz.	1	.2414	.2525	-
Sour Cream Dip	8 oz.	1	.1693	.1804	.2266
Cottage Cheese	8 oz.	1/2	.1310	.1366	.1445
Cottage Cheese	Lb.	1	.2314	.2425	.2574
CottageCheese	2 Lb.	2	.4374	.4596	.4675
Cottage Cheese-Flav.	Lb.	1	.2653-2564	.2764 2675	.2698
Dry Curd Cheese	12 oz.	1	.2747 2371	.2858 2489	.1814

(1) Considers stores located in McComb, Illinois and Burlington, Iowa.

2241 2127 1[illegible]

3349

BORDEN DOCK PRICE

F.O.B. PEKIN, ILLINOIS

and

ESTIMATED STORE DELIVERED COST
USING EAGLE EMPLOYED CONTRACT CARRIER
OR EAGLE'S OWN TRANSPORT EQUIPMENT
TO STORES LOCATED AT McCOMB AND
BURLINGTON

(1) It is up to Eagle as the buyer at Borden's dock to arrange for the transportation to its stores. Contract Carriers are available for this purpose.

(2) We believe that one such contract carrier has the transportaion service available on the following basis:

(a) Delivery Runs - one 3-day run per week.

(b) Rates: 37¢ per mile plus a $2.50 charge per stop plus 2-1/2¢ per case over 100 cases.

(c) Estimated Cost:

645 miles @ 37¢ per mile plus 10%	$ 263.00
18 stops @$2.50 per stop	45.00
Total	$ 308.00
Average Cost Per Point	.0111
Average Cost Per 1/2 Gallon	.0222

(d) Applying the average cost per point shown under (c) above, it is estimated that the unit cost delivered to the stores listed below would approximate the figures shown under column 2 of the following schedule.

(e) It may well be that Eagle as a dock purchaser may arrange a delivery cost from a different carrier at a lesser cost.

(f) Stores included in Estimated Cost (item C above):

McComb, Illinois #221

Burlington, Iowa #127

1001

9/12/68

SCHEDULE SHOWING DOCK PRICES
(F. O. B. ROCK ISLAND, ILLINOIS)
AND
(1) ESTIMATED STORE DELIVERED COSTS
USING EAGLE EMPLOYED CONTRACT CARRIER
OR EAGLE'S OWN TRANSPORT EQUIPMENT

Product	Size	Point Value	Dock Price F. O. B. Rock Island, Illinois	Estimated Store Delivered Cost (1)	Present Prices Quad City Area	Present Prices Marshalltown
Food Club						
Homo Milk 3.3% B.F.	Gallon	4	$ .6464	$ .6784	$ .7566	$ .7240
Homo Milk 3.3% B.F.	1/2 Gal.	2	.3222	.3382	.3783	.3620
2%	Gallon	4	.5964	.6284	.6984	–
2%	1/2 Gal.	2	.2972	.3132	.3492	.3287
Fortified Skim	1/2 Gal.	2	.2483	.2643	.3379	.3130
Half & Half	Pint	1	.1847	.1927	.2780	.2656
Cottage Cheese	Lb.	1	.2289	.2369	.2407	–
	24	2	.4324	.4484		
Borden Label						
Homo Milk-Glass 3.3% B.F.	Gallon	4	.6365	.6685	.7343	.7015
Homo Milk-Paper 3.3% B.F.	Gallon	4	.6564	.6884	.7766	.7436
Homo Milk 3.3% B.F.	1/2 Gal.	2	.3272	.3432	.3883	.3718
Homo Milk 3.3% B.F.	Quart	1	.1752	.1832	.2125	.2019
2%	Gallon	4	.6064	.6384	.7184	–
2%	1/2 Gal.	2	.3022	.3182	.3592	.3385
Chocolate Milk	Quart	1	.2037	.2117	.2350	.2325
Chocolate Skim	1/2 Gal.	2	.2882	.3042	–	.3752
Fortified Skim	1/2 Gal.	2	.2533	.2693	.3479	.3228
Fortified Skim	Quart	1	.1326	.1406	.1974	.1888
Buttermilk	1/2 Gal.	2	.2667	.2827	–	–
Buttermilk	Quart	1	.1363	.1443	.2125	.2132
Half & Half	Quart	2	.3657	.3817	–	–
Half & Half	Pint	1	.1872	.1952	.2830	.2754
Whipping Cream	1/2 Pint	1	.1961	.2041	.3131	.3257
Sour Cream	16 oz.	2	.3095	.3255	.4002	–
Sour Cream	8 oz.	1	.1693	.1773	.2463	.2769
Sour Half & Half	16 oz.	1	.2406	.2486	–	–
Sour Cream Dip	8 oz.	1	.1691	.1771	.2905	.2973
Cottage Cheese	8 oz.	1/2	.1310	.1351	.1488	-
Cottage Cheese	Pound	1	.2314	.2394	.2457	–
Cottage Cheese	2 Lb.	2	.4374	.4534	.4322	.5093
Cottage Cheese-Flav.	Pound	1	.2653 2564	.2733 2644	.2608	.2755
Dry Curd Cheese	12 oz.	1	.2747 2371	.2827 2457	.1926	.2253

(1) Considers stores located in Davenport, Bettendorf, Clinton, Iowa City, Cedar Rapids, Dubuque, Marshalltown, Cedar Falls and Waterloo.

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BORDEN DOCK PRICES
F. O. B. ROCK ISLAND, ILLINOIS

AND

ESTIMATED STORE DELIVERED COSTS
USING EAGLE EMPLOYED CONTRACT CARRIER
OR EAGLE'S OWN TRANSPORT EQUIPMENT

(1) It is up to Eagle as the buyer at Borden's dock to arrange for for the transportation to its stores. Contract carriers are available for this prupose.

(2) We believe that one such contract carrier has the transportation service available on the following basis:

(a) Delivery Runs - five 3-day runs per week.

(b) Rates: 37¢ per mile plus a $2.50 charge per stop plus 2-1/2¢ per case over 100 cases.

(c) Estimated Cost:

2,650 miles @ 37¢ per mile plus 10%	$ 1,078.00
66 stops @ $2.50 per stop	165.00
600 cases @ 2-1/2¢ per case	15.00
Total Cost	$ 1,258.00
Average Cost Per Points	.0080
Average Cost Per 1/2 Gallon	.0160

(d) Applying the average cost per point shown under (c) above, it is estimated that the unit cost delivered to the stores listed below would approximate the figures shown under Column 2 of the following schedule.

(e) It may well be that Eagle as a dock purchaser may arrange a delivery cost from a different carrier at a lesser cost.

(f) Stores included in Estimated Cost (Item c above):

#82	#109	#129	#139	#220
#83	#115	#130	#144	#229
#87	#122	#131	#149	
#89	#123	#132	#150	
#105	#128	#138	#157	

1002

SCHEDULE SHOWING DOCK PRICES
(F.O.B. WOODSTOCK, ILLINOIS)
AND
PROJECTED STORE DELIVERED COSTS
USING EAGLE EMPLOYED CONTRACT CARRIER
OR EAGLE'S OWN TRANSPORT EQUIPMENT

Product	Size	Point Value	Dock Price F.O.B. Woodstock, Illinois	Estimated Store Delivered Cost (1)	Present Temporary Madison Competitive Prices	Normal Madison Prices
Food Club						
Homo Milk 3.3% B.F.	Gallon	4	$ .6464	$ .6908	$ .7000	$ .7800
Homo Milk 3.3% B.F.	1/2 Gal.	2	.3222	.3444	.3400	.3900
2%	Gallon	4	.5964	.6408	.6800	.7200
2%	1/2 Gal.	2	.2972	.3194	.3100	.3600
Fortified Skim	1/2 Gal.	2	.2483	.2705	.3260	.3260
Half & Half	Pint	1	.1847	.1958	.2720	.2720
Cottage Cheese	Lb.	1	.2204	.2315	.2845	.2845
			4154	4376		
Borden Label						
Homo Milk-Glass 3.3% B.F.	Gallon	4	.6365	.6809	.6800	.7720
Homo Milk-Paper 3.3% B.F.	Gallon	4	.6564	.7008	.7000	.7800
Homo Milk 3.3% B.F.	1/2 Gal.	2	.3272	.3494	.3400	.3900
Homo Milk 3.3% B.F.	Quart	1	.1752	.1863	.2020	.2020
2%	Gallon	4	.6064	.6508	.6800	.7200
2%	1/2 Gal.	2	.3022	.3244	.3100	.3600
Chocolate Milk	Quart	1	.2037	.2148	.2510	.2510
Chocolate Skim	1/2 Gal.	2	.2882	.3204	-	-
Fortified Skim	1/2 Gal.	2	.2533	.2755	.3260	.3260
Fortified Skim	Quart	1	.1326	.1427	.1700	.1700
Buttermilk	1/2 Gal.	2	.2667	.2889	.3640	.3640
Buttermilk	Quart	1	.1363	.1474	.1880	.1880
Half & Half	Quart	2	.3657	.3879	.5290	.5290
Half & Half	Pint	1	.1872	.1983	.2720	.2720
Whipping Cream	1/2 Pint	1	.1961	.2072	.3420	.3420
Sour Cream	16 oz.	2	.3095	.3317	.4690	.4690
Sour Cream	8 oz.	1	.1693	.1804	.2430	.2430
Sour Half & Half	16 oz.	1	.2406	.2517	.3610	.3610
Sour Cream Dip	8 oz.	1	.1691	.1802	.3100	.3100
Cottage Cheese	8 oz.	1/2	.1267	.1323	.1772	.1772
Cottage Cheese	Lb.	1	.2229	.2340	.2845	.2845
Cottage Cheese	2 Lb.	2	.4204	.4426	.5390	.5390
Cottage Cheese-Flav.	Lb.	1	.2568 2479	.2679 2590	.3045	.3045
Dry Curd Cheese	12 oz.	1	.2683 2313	.2794 2424	-	-
60%			3105	3327		
50%			2619	2841		

(1) Applicable to stores located in Madison, Middleton, Stoughton, Ft. Atkinson, Monroe, [illegible] and Beloit

Borden Dock Price

f.o.b. Woodstock, Illinois

and

Estimated Store Delivered Costs, using Eagle employed contract carrier or Eagle's own transport equipment to stores located in the Wisconsin area.

(1) It is up to Eagle as the buyer at Borden's dock to arrange for the transportation to its stores. Contract carriers are available for this purpose.

(2) We believe that one such contract carrier has the transportation service available on the following basis:

(a) Delivery Runs - Three 3-day runs per week.

(b) Rate: $9.15 per hour plus $10.00 a day for trailer.

(c) Estimated Cost:

101 hours @ $9.15 per hour =	$927.00
Trailers @ $10.00 per day	120.00
Permits, etc.	70.00
Total	$1117.00
Average Cost per Point	.0111
Average Cost per 1/2 Gallon	.0222

(d) Applying the average cost per point shown under (c) above, it is estimated that the unit cost delivered to the stores listed below would approximate the figures shown under Column 2 of the following schedule.

(e) It may well be that Eagle as a dock purchaser may arrange a delivery cost from a different carrier at a lesser cost.

(f) Stores included in Estimated Costs (item c above)

#55	#60	#67
#56	#64	#71
#57	#65	#74
#58	#66	#154
#59	#67	#226

RBX22A-U

Especially prepared

FOR

NATIONAL

FOOD STORES

1042a

B

THE BORDEN COMPANY
CHICAGO REGION
1821 S. KILBOURN AVENUE
CHICAGO, ILLINOIS 60623

AREA CODE 312 277-6400

November 21, 1968

Mr. Chester Andrews
Sales Manager - Chicago Division
National Tea Company
901 W. Division Street
Chicago, Illinois 60622

Dear Mr. Andrews:

This opportunity to present to you a National-Borden Fluid Milk Program for your National markets in the National Chicago Division is sincerely appreciated.

We are confident that you will find in this presentation, the kind of product program that stimulates and motivates the attainment of increased sales volume and greater profit levels.

The products produced under the National label will be manufactured and processed in accordance with the high quality standards established by Borden. These products, together with the Borden label milk products supplementing the National line, will be processed and packaged in Borden's most modern production plant located at Woodstock, Illinois. This plant, which is the largest fully automated plant in the world handling a full and complete line of fluid milk items places Borden in the enviable position of being able to handle in the most efficient manner, your Chicago Division requirements. Our plant laboratory control program makes certain the pure and wholesome quality of the productsproduced and the strict adherence to the various local, State and Federal standards.

You will find attached a series of six (6) schedules which set forth the delivered net prices covering National label and Borden label milk product, the terms and conditions in connection with this proposed program, price adjustment factors covering changes in raw milk costs and data in connection with promotional programming. This latter area establishes the proper coordination of merchandising, advertising and selling programs and concepts which are designed to produce the maximum results for National. In this important field as related to fluid milk products, we have the expertise and experience and to this end we will coordinate all of the aspects to make certain that this program involving the 243 National stores in your Chicago Division and Borden's strategically located plants and distribution locations

will function smoothly as a unit and that mutually all parties will achieve the optimum possible from this program.

Certainly not to be overlooked is Borden's advertising program and proven consumer acceptance. Every day we are working, Borden's advertising is also working as a "Silent Salesman" in your stores, helping to create increased consumer interest and impulse sales of dairy products.

We also believe that it is important to give recognition to the location of the various Borden distribution points which provide for greater and more efficient distribution flexibility. In addition to facilities centrally located in Chicago, distribution branches are located at Rockford, Elgin and Libertyville, Illinois, Hammond and South Bend, Indiana, and Grand Rapids, Michigan. This complex of locations provide more service flexibility than is obtainable from any other Chicago area dealer.

A great deal more could be said in regard to our quality, consumer acceptanc merchandising, experience and personnel know-how, which would contribute to a successful National-Borden Fluid Milk Program. However, we are sure that you are quite familiar with these plus factors.

We are grateful for your time and consideration of our proposal and request to become a part of your National program. Please rest assured that your confidence in us will be returned many, many times by our people through their work, efforts, enthusiasm and cooperation.

Sincerely,

BORDEN, INC.
Chicago Region

W. J. Jensen
General Sales Manager

D

GENERAL TERMS AND CONDITIONS
APPLICABLE TO ALL OF THE
FOLLOWING PRICE SCHEDULES

TERMS AND CONDITIONS

E

The unit prices shown on the attached price schedules relate to National and Borden label products and are subject to terms and conditions as herein set forth.

(A) The unit selling prices for Class I and Class II products as set forth on our price schedules are based on the present net Class I prices as follows:

	October, 1968
Woodstock, Illinois (Chicago Federal Order)	$5.70 Class I Super Pool Prices Per Cwt.
	$4.28 Class II Cost Per
Michigan Area (Michigan Federal Order)	$6.20 Class I Price Per
	$4.38 Class II Cost Per

The unit selling prices set forth on our price schedules will be subject monthly to automatic adjustments up or down in accordance with the changes occurring in the Class I and Class II announced milk prices under the Federal Order Progr or, a negotiated Class I Super Pool Price, in accordance with cost change factor set forth on our Price Adjustment Schedule.

(B) In the event the Class I milk price established under the provisions o the Federal Order in effect or a negotiated Class I milk price establishes a change in the presently recognized butterfat and skim milk values, the effect of such change will be automatically reflected wher applicable in the unit prices as set forth on our price schedule.

(C) Ordering of products.

(1) Products will be pre-ordered at least two (2) days prior to the date of delivery.

(2) Borden personnel will assist in the formulation of this program and will work with National personnel during the introductory period in the various phases of ordering and scheduling.

(D) To provide the most efficient delivery system, the cooperation of store personnel is necessary to conserve driver and truck time. Deliveries will be made inside the back door of your stores.

(E) Store personnel must place empty milk cases and bottles at designated points for pick-up by the driver.

(F) Code Dates.

(1) Products will be clearly coded on the gable of the milk items and on the bottom of all bucket products.

(2) All products are coded with an expiration date.

(3) Code date requirements and expirations will be explained at local levels as requested.

(G) Credit for Product Returns.

(1) Credit for product returns shall only consider faulty containers at the time of delivery.

(H) Under this program private label purchases do not include the performance of advertising, store promotions, in-store material, product promotions, etc. on the part of Borden.

(I) Containers.

The unit selling prices shown on all price schedules are related to Borden's present unit purchase cost of containers. Any changes in the purchase cost of containers will be automatically reflected in the unit selling prices.

(J) Any special deliveries (other than regular schedule) will be subject to a $10.00 delivery charge.

(K) Changes occurring in the cost of labor as a result of union contract changes, changes in the cost of materials and supplies and other applicable costs will be considered as the basis for an adjustment, up or down, to the unit selling prices set forth on all price schedules attached hereto.

(L) Invoices covering products purchased will be made on a weekly basis with payment due within ten (10) days from billing date.

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BORDEN, INC.

G

PRICE ADJUSTMENT SCHEDULE

COVERING RAW MILK COST CHANGES

Class I Milk Products

If Class I Milk Cost Increases or Decreases Per Cwt.	Selling Prices Will Increase or Decrease Per Point	If Class I Milk Increased or Decreases Per Cwt.	Selling Price Will Increase Decrease Pe
$ .01	$ .0002	$ .24	$ .0052
.02	.0004	.25	.0054
.03	.0007	.26	.0056
.04	.0009	.27	.0059
.05	.0010	.28	.0061
.06	.0013	.29	.0063
.07	.0015	.30	.0065
.08	.0017	.31	.0067
.09	.0019	.32	.0069
.10	.0021	.33	.0072
.11	.0024	.34	.0074
.12	.0026	.35	.0076
.13	.0028	.36	.0078
.14	.0030	.37	.0080
.15	.0033	.38	.0082
.16	.0035	.39	.0085
.17	.0037	.40	.0087
.18	.0039	.41	.0089
.19	.0041	.42	.0091
.20	.0043	.43	.0093
.21	.0045	.44	.0095
.22	.0048	.45	.0098
.23	.0050	.46	.0100

Class II Cottage Cheese

If Class II Milk Cost Increases or Decreases Per Cwt.	Selling Prices Will Increase or Decrease Per Pound
$ .01	$ .0005

H

BORDEN DROP DELIVERY PRICE SCHEDULES

(1) Chicago and Calumet Areas

(2) Rockford and Freeport, Illinois Areas

(3) Libertyville and Elgin, Illinois Areas

(4) Central-Illinois Areas

(5) South Bend-Michigan City Areas

(6) Benton Harbor, Kalamazoo, Battle Creek and Lansing Areas

BORDEN, INC.
Chicago Region

BORDEN WHOLESALE DELIVERY PRICES *
SIX (6) DAY DROP DELIVERY PROGRAM
CHICAGO AND CALUMET AREA

Point Value	Product National Label	Size & Type	Net Price
4	Homo V. D. Milk	Gallon - Paper	$ .7716
2	Homo V. D. Milk	1/2 Gal. - Paper	.3828
	Borden Label		
4	Homo V. D. Milk	Gallon - Glass	.7440
4	Homo V. D. Milk	Gallon - Paper	.7816
2	Homo V. D. Milk	1/2 Gal. - Paper	.3878
1	Homo V. D. Milk	Quart - Paper	.2089
4	2%	Gallon - Paper	.7396
2	2%	1/2 Gal. - Paper	.3668
1	Chocolate Milk	Quart - Paper	.2555
1/2	Shake	1/2 Pint - Paper	.0815
2	Chocolate Skim	1/2 Gal. - Paper	.3697
2	Fortified Skim	1/2 Gal. - Paper	.3352
1	Fortified Skim	Quart - Paper	.1722
2	Buttermilk	1/2 Gal. - Paper	.3460
1	Buttermilk	Quart - Paper	.1759
2	Sour Cream	16 oz. Carton	.3834
1	Sour Cream	8 oz. Carton	.2063
1	Sour Half & Half	Pint - Paper	.3424
2	Half & Half	Quart - Paper	.4557
1	Half & Half	Pint - Paper	.2314
1	Whipping Cream	1/2 Pint - Paper	.2317
1/2	Cottage Cheese	8 oz. Carton	.1778
1	Cottage Cheese	16 oz. Carton	.2781
2	Cottage Cheese	32 oz. Carton	.5304
1	Flavored Cottage Cheese	16 oz. Carton	.3031
1	Dry Cheese	12 oz. Carton	.3039-.35
1	Sour Cream Dips	8 oz. Carton	.2092
1	Yogurt, Plain & Vanilla	8 oz. Carton	.1737
1	Yogurt, Flavored	8 oz. Carton	.2017
1	Egg Nog	Quart	.3896

*The above prices are net and subject to no further discounts. The homo and 2% paper gallon container prices represent the inclusion of the container handle. These prices are subject to the attached terms and conditions, applicable to stores located as follows:

1050a

1050a

NATIONAL TEA COMPANY

Chicago Area - 6 Day Delivery

Store No.	Address	Town
251	1055 Bryn Mawr	Chicago
252	7614 N. Paulina St.	Chicago
253	1043 W. Granville	Chicago
502	2841 Touhy Avenue	Chicago
513	740 W. Diversey	Chicago
514	1521 W. Belmont	Chicago
534	1440 W. Devon	Chicago
537	2211 W. Devon	Chicago
555	1520 W. Fullerton	Chicago
575	2480 N. Clark	Chicago
605	7238 N. Damen	Chicago
618	3637 N. Southport	Chicago
640	3646 N. Broadway	Chicago
644	4445 N. Sheridan	Chicago
645	4812 N. Sheridan	Chicago
651	4055 N. Broadway	Chicago
677	2127 W. Lawrence	Chicago
678	1964 W. Foster	Chicago
256	1120 N. State	Chicago
501	2722 N. Milwaukee	Chicago
503	1615 N. Sedgwick	Chicago
512	1600 W. Superior	Chicago
556	2274 N. Milwaukee	Chicago
558	3235 N. Springfield	Chicago
559	2010 N. Damen	Chicago
560	2140 N. Western	Chicago
563	2301 W. Division	Chicago
564	2153 W. Roscoe	Chicago
568	3104 W. Armitage	Chicago
622	2344 W. Chicago	Chicago
627	2650 W. Division	Chicago
652	4349 N. Damen	Chicago
654	3937 N. Ashland	Chicago
658	4112 N. Lincoln	Chicago
100	122 Green Bay Road	Winnetka
101	1409 Waukegan Road	Glenview
102	1108 Central Avenue	Wilmette
103	3244 Lake Avenue	Wilmette
109	1146 Chicago Avenue	Evanston
117	333 Ridge Road	Wilmette
118	636 Deerfield Road	Deerfield
120	430 Asbury	Evanston
124	838 Dodge Avenue	Evanston
137	3808 Dempster	Skokie
261	716 Waukegan	Deerfield
262	305 Happ Road	Northfield
263	341 Hazel	Glencoe
122	1155 Lee Street	Des Plaines
147	2745 Mannheim	Franklin Park
148	6311 W. North Avenue	Oak Park
149	219 W. Main Street	Bensenville
154	121 Grand Avenue	Melrose Park
165	1047 York Road	Bensenville
169	3121 N. Thatcher	River Grove
626	4401 W. Armitage	Chicago
648	761 N. Laramie	Chicago
662	330 N. Central	Chicago
663	5719 W. Diversey	Chicago
664	4441 W. Diversey	Chicago
665	5140 W. Diversey	Chicago
689	6725 W. Belmont	Chicago
694	1705 N. Harlem	Chicago
703	9310 W. Irving Park	Schiller Park
107	7118 Golf Road	Morton Grove
108	290 Golf Mill Center	Niles
119	1042 Northwest Hwy.	Park Ridge
130	7201 Dempster	Niles
136	5314 N. Lincoln Ave.	Skokie
159	4115 N. Harlem	Norridge
161	5148 N. Harlem	Harwood Hts.
254	6133 N. Lincoln	Chicago
264	3950 W. Devon	Lincolnwood
504	6785 Northwest Hwy.	Chicago
532	4751 N. Elston	Chicago

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NATIONAL TEA COMPANY

Chicago Area -- 6 Day Delivery

Store No.	Address	Town
608	4242 N. Central	Chicago
609	6310 N. Nagle	Chicago
610	5330 N. Milwaukee	Chicago
666	3301 W. Lawrence	Chicago
668	4343 N. Kedzie	Chicago
706	279 Lawrencewood	Niles
197	5840 W. 35th Street	Cicero
522	213 N. Pulaski	Chicago
671	4905 W. Madison	Chicago
867	6611 S. Halsted	Chicago
869	5135 S. Damen Avenue	Chicago
920	5300 S. Halsted St.	Chicago
929	5346 S. Ashland	Chicago
955	2101 W. Cermak Road	Chicago
958	2321 S. Kedzie Avenue	Chicago
971	1918 W. 35th Street	Chicago
976	4023 S. Archer Avenue	Chicago
977	2623 S. Pulaski Road	Chicago
986	3307 W. 63rd Street	Chicago
988	6220 S. Damen	Chicago
997	2514 W. 47th Street	Chicago
1003	4666 S. Halsted	Chicago
860	9241 S. Ashland	Chicago
861	8325 S. Ashland	Chicago
871	7443 S. Racine	Chicago
876	7531 S. Vincennes	Chicago
885	2346 E. 79th Street	Chicago
886	2825 W. 79th Street	Chicago
887	1312 E. 79th Street	Chicago
892	8558 S. Cottage Grove	Chicago
893	1220 E. 87th Street	Chicago
894	6330 S. Stony Island	Chicago
896	7162 S. Exchange	Chicago
898	7739 S. Exchange	Chicago
941	1346 E. 53rd Street	Chicago
440	4369 W. 5th Avenue	Gary
441	2500 Central	East Gary
447	637 East Ridge	Gary
448	6105 East Dunes Hwy.	Gary
302	159th & Stanley	Calumet City
396	501 E. Pennsylvania	Dolton
398	17829 Burnham	Lansing
430	8401 Wicker Park	Highland, Ind.
453	116 Sibley Street	Hammond
454	167th & Indianapolis	Hammond
858	2325 E. 95th Street	Chicago
167	3720 West 95th St.	Evergreen Park
170	4060 Southwest Hwy.	Hometown
172	4720 West 103rd Street	Oaklawn
176	12637 S. Ashland	Calumet Park
177	147th & Cicero	Midlothian
300	1919 Bremerton	E. Hazelcrest
304	16720 S. Oak Park	Tinley Park
395	276 W. 148th Place	Harvey
397	2959 W. 159th Street	Markham
850	115th & Western	Chicago
851	801 West 119th St.	Chicago
854	11525 S. State St.	Chicago
857	10815 S. Halsted	Chicago
	90th & Halsted	Chicago
146	12 East North Ave.	Northlake
151	1706 N. Main Street	Wheaton
152	915 Roosevelt	Wheaton
153	607 W. North Avenue	Villa Park
155	44 South Villa	Villa Park
158	837 Westmore	Lombard
164	530 North Avenue	Glendale Hts.
166	570 Crescent Blvd.	Glen Ellyn
190	942 S. York Road	Elmhurst
751	110 W. North Avenue	Elmhurst
753	401 Main Street	Lombard
758	430 Addison Road	Addison
179	63rd & Main Street	Downers Grove
192	1101 Ogden	Downers Grove

NATIONAL TEA COMPANY

Chicago Area - 6 Day Delivery

Store No.	Address	Town
199	5329 Main Street	Downers Grove
308	561 Cass Street	Joliet
311	950 Jefferson	Joliet
327	130 N. Jefferson	Naperville
754	1020 Maple	Lisle
123	2995 Kirchoff Road	Rolling Meadows
157	321 W. Northwest Hwy.	Palatine
162	17 South Dunton	Arlington Hts.
702	241 Rand Road	Mt. Prospect
704	212 W. Northwest Hwy.	Arlington Hts.
705	Golf & Roselle Roads	Hoffman Estates
707	1010 S. Elmhurst Road	Mt. Prospect
168	111h S. Harlem Ave.	Worth
171	8821 West 87th Street	Hickory Hills
173	5525 West 87th Street	Oaklawn
175	87h9 Ridgeland	Oaklawn
178	55th & Plainfield	LaGrange
185	7546 W. 63rd Street	Argo
188	419 LaGrange Road	LaGrange
189	Grant Square	Hinsdale
681	80h5 S. Cicero(Scottsdale)	Chicago
688	76th & Cicero (Ford City)	Chicago
989	6201 S. Pulaski	Chicago
990	6150 W. 63rd Street	Chicago
994	6301 W. 55th Street	Chicago
1h0	25 W. Lake Street	Oak Park
1h4	1708 Main Street	Melrose Park
150	21st & Roosevelt	Broadview
156	820 S. Oak Park Ave.	Oak Park
181	4h24 W. Prescott	Lyons
184	4926 W. Cermak Road	Cicero
186	3743 S. Harlem	Berwyn
187	3310 S. Oak Park Ave.	Berwyn
195	2120 S. Mannheim	Westchester
196	5525 St. Charles Rd.	Berkeley
521	3635 W. Chicago Ave.	Chicago
752	215 N. Harlem	Forest Park

Store No.	Address	Town
755	325 N. Mannheim Rd.	Bellwood
757	6226 W. Roosevelt	Oak Park

BORDEN, INC.
Chicago Region

m

BORDEN WHOLESALE DELIVERY PRICES *
THREE (3) DAY DROP DELIVERY PROGRAM
WESTERN MICHIGAN

Point Value	Product	Size	Net Prices
National Label			
4	Homo V. D. Milk	Gallon - Paper	$ .7510
2	Homo V. D. Milk	1/2 Gallon - Paper	.3755
Borden Label			
4	Homo V. D. Milk	Gallon - Paper	.7610
2	Homo V. D. Milk	1/2 Gallon - Paper	.3805
1	Homo V. D. Milk	Quart - Paper	.2070
4	Hi-Pro	Gallon - Paper	.7060
2	Hi-Pro	1/2 Gallon - Paper	.3580
1	Chocolate Milk	Quart - Paper	.2340
2	Chocolate Skim	1/2 Gallon - Paper	.4230
2	Fortified Skim	1/2 Gallon - Paper	.2930
1	Fortified Skim	Quart - Paper	.1650
2	Buttermilk	1/2 Gallon - Paper	.3690
1	Buttermilk	Quart - Paper	.1910
2	Sour Cream	16 oz. Carton	.3400
1	Sour Cream	8 oz. Carton	.1840
2	Half & Half	Quart - Paper	.4070
1	Half & Half	Pint - Paper	.2170
1/2	Whipping Cream	1/2 Pint - Paper	.2600
1	Cottage Cheese	16 oz. Carton	.2550
2	Cottage Cheese	30 oz. Carton	.4640
1	Flavored Cottage Cheese	16 oz. Carton	.2750
1	Dry Cheese	12 oz.	.2550
1	Sour Cream Dips	8 oz.	.2190
1	Yogurt, Plain & Vanilla	8 oz. Carton	.1810
1	Yogurt, Flavored	8 oz. Carton	.2010

* The above prices are net and subject to no further discounts. These prices are subject to the terms and conditions as set forth, applicable to stores located as follows:

NATIONAL TEA COMPANY

Rockford Area - 3 Day Delivery

Store No.	Address	Town
355	121-33 W. Lincoln Hwy.	DeKalb
357	N.W. Corner of State & California	Sycamore

2

BORDEN, INC.
Chicago Region

BORDEN WHOLESALE DELIVERY PRICES *
FIVE (5) DAY TRAILER DROP DELIVERY PROGRAM
LIBERTYVILLE & ELGIN, ILLINOIS

Point Value	Product	Size	Net Prices
National Label			
4	Homo V. D. Milk	Gallon - Paper	$ .7620
2	Homo V. D. Milk	1/2 Gallon - Paper	.3780
Borden Label			
4	Homo V. D. Milk	Gallon - Glass	$ .7344
4	Homo V. D. Milk	Gallon - Paper	.7720
2	Homo V. D. Milk	1/2 Gallon - Paper	.3830
1	Homo V. D. Milk	Quart - Paper	.2065
4	2%	Gallon - Paper	.7300
2	2%	1/2 Gallon - Paper	.3620
1	Chocolate Milk	Quart - Paper	.2531
1/2	Shake	1/2 Pint - Paper	.0803
2	Chocolate Skim	1/2 Gallon - Paper	.3649
2	Fortified Skim	1/2 Gallon - Paper	.3304
1	Fortified Skim	Quart - Paper	.1698
2	Buttermilk	1/2 Gallon - Paper	.3412
1	Buttermilk	Quart - Paper	.1735
2	Sour Cream	16 oz. Carton	.3786
1	Sour Cream	8 oz. Carton	.2039
1	Sour Half & Half	Pints - Paper	.3376
2	Half & Half	Quart - Paper	.4509
1	Half & Half	Pint - Paper	.2290
1/2	Whipping Cream	1/2 Pint - Paper	.2293
1/2	Cottage Cheese	8 oz. Carton	.1766
1	Cottage Cheese	16 oz. Carton	.2757
2	Cottage Cheese	32 oz. Carton	.5256
1	Flavored Cottage Cheese	16 oz. Carton	.3007
1	Dry Cheese	12 oz.	.3031
1	Sour Cream Dips	8 oz.	.2068
1	Yogurt, Plain & Vanilla	8 oz. Carton	.1713
1	Yogurt, Flavored	8 oz. Carton	.1993
1	Egg Nog	Quarts	.3872

* The above prices are net and subject to no further discounts. The homo and 2% paper gallon containers represent the inclusion of the containers handles. These prices are subject to the terms and conditions as set forth, applicable to store located as follows:

1956a

NATIONAL TEA COMPANY

Elgin-Libertyville - 5 Day Delivery

Store No.	Address	Town
104	1204 W. 21st Street	Zion
110	516 N. Western Avenue	Lake Forest
112	2225 Belvidere Road	Waukegan
115	1501 Lewis Street	Waukegan
114	Route 134	Round Lake
319	Route 14 & Silver Lake Rd.	Cary
320	350 Virginia Avenue	Crystal Lake
323	220 Jefferson	Woodstock
325	663 Villa	Elgin
326	611 Dundee Road	Elgin
330	3750 West Elm Street	McHenry
347	160 E. Summer Street	Harvard
349	135 W. Northwest Hwy.	Barrington
701	17 Lakeland Plaza	Fox Lake
322	559 Main Street	West Chicago
335	716 West State Street	Geneva
332	380 Galena Boulevard	Aurora
337	30 North Root Street	Aurora
1002	1272 Lake Street	Aurora
126	425 Liberty	Wauconda
128	1900 S. Wolf Road	Wheeling
129	834 W. Dundee Road	Wheeling
135	120 North Milwaukee	Libertyville
142	61 Center Street	Grayslake
163	450 Lake Street	Mundelein

BORDEN, INC.
Chicago Region

9

BORDEN WHOLESALE DELIVERY PRICES *
THREE (3) DAY DROP DELIVERY PROGRAM
WESTERN MICHIGAN

Point Value	Product	Size	Net Prices
National Label			
4	Homo V. D. Milk	Gallon - Paper	$ .7510
2	Homo V. D. Milk	1/2 Gallon - Paper	.3755
Borden Label			
4	Homo V. D. Milk	Gallon - Paper	.7610
2	Homo V. D. Milk	1/2 Gallon - Paper	.3805
1	Homo V. D. Milk	Quart - Paper	.2070
4	Hi-Pro	Gallon - Paper	.7060
2	Hi-Pro	1/2 Gallon - Paper	.3580
1	Chocolate Milk	Quart - Paper	.2340
2	Chocolate Skim	1/2 Gallon - Paper	.4230
2	Fortified Skim	1/2 Gallon - Paper	.2930
1	Fortified Skim	Quart - Paper	.1650
2	Buttermilk	1/2 Gallon - Paper	.3690
1	Buttermilk	Quart - Paper	.1910
2	Sour Cream	16 oz. Carton	.3400
1	Sour Cream	8 oz. Carton	.1840
2	Half & Half	Quart - Paper	.4070
1	Half & Half	Pint - Paper	.2170
1/2	Whipping Cream	1/2 Pint - Paper	.2600
1	Cottage Cheese	16 oz. Carton	.2550
2	Cottage Cheese	30 oz. Carton	.4640
1	Flavored Cottage Cheese	16 oz. Carton	.2750
1	Dry Cheese	12 oz.	.2550
1	Sour Cream Dips	8 oz.	.2190
1	Yogurt, Plain & Vanilla	8 oz. Carton	.1810
1	Yogurt, Flavored	8 oz. Carton	.2010

* The above prices are net and subject to no further discounts. These prices are subject to the terms and conditions as set forth, applicable to stores located as follows:

1058a

NATIONAL TEA COMPANY

Michigan - 3 Day Delivery

Store No.	Address	Town
5	1017 West Sagniaw	Lansing
30	3013 Cakland Drive	Kalamazoo
31	3520 East Main Street	Kalamazoo
35	124 East Green	Marshall
43	2384 West Michigan	Battle Creek
50	1601 South Burdick	Kalamazoo
53	425 West Van Buren	Battle Creek
54	540 Main Street	Battle Creek
57	24 East Columbia	Battle Creek
58	5125 Portage	Kalamazoo

BORDEN, INC.
Chicago Region

9

BORDEN WHOLESALE DELIVERY PRICES *
THREE (3) DAY TRAILER DROP DELIVERY PROGRAM
SOUTH BEND - MICHIGAN CITY AREA
And
CENTRAL ILLINOIS AREA

POINT VALUE	PRODUCT	SIZE	NET PRICES
4	Homo V. D. Milk	Gallon	$ .7320
2	Homo V. D. Milk	1/2 Gallon	.3630
Borden Label			
4	Homo V. D. Milk	Gallon, Glass	.7044
4	Homo V. D. Milk	Gallon, Paper	.7420
2	Homo V. D. Milk	1/2 Gallon	.3680
1	Homo V. D. Milk	Quart	.1990
4	2%	Gallon	.7000
2	2%	1/2 Gallon	.3470
1	Chocolate Milk	Quart	.2356
1/2	Shake	1/2 Pint	.0791
2	Chocolate Skim	1/2 Gallon	.3499
2	Fortified Skim	1/2 Gallon	.3154
1	Fortified Skim	Quart	.1623
2	Buttermilk	1/2 Gallon	.3262
1	Buttermilk	Quart	.1660
2	Sour Cream	16 oz.	.3636
1	Sour Cream	8 oz.	.1964
1	Sour Half & Half	Pint	.3301
2	Half & Half	Quart	.4359
1	Half & Half	Pint	.2215
1	Whipping Cream	1/2 Pint	.2218
1/2	Cottage Cheese	8 oz.	.1729
1	Cottage Cheese	16 oz.	.2682
2	Cottage Cheese	32 oz.	.5106
1	Flavored Cottage Cheese	16 oz.	.2932
1	Dry Cheese	12 oz.	.2956
1	Sour Cream Dips	8 oz.	.1993
1	Yogurt, Plain and Vanilla	8 oz.	.1638
1	Yogurt, Flavored	8 oz.	.1918
1	Egg Nog	Quart	.3697

*The above prices are net and subject to no further discount. The Homo and 2% paper gallon container prices represent the inclusion of the container handle. These prices are subject to the terms and conditions as set forth, applicable to stores located as follows:

1060a

NATIONAL TEA COMPANY

South Bend - 3 Day Delivery

Store No.	Address	Town
19	400 Broadway	Niles, Mich.
431	609 Lincolnway East	LaPorte, Ind.
432	320 Miracle Lane	Mishawaka
434	52101 Dixieway North	South Bend
436	1935 Lincolnway East	South Bend
438	2303 East Michigan	Michigan City
439	3231 Franklin	Michigan City
459	152 West Indiana	Valparaiso
457	219 S. Main Street	Crown Point
21	815 Main Street	St. Joseph, Mich.
27	325 East Main Street	Benton Harbor
51	1823 M-139	Benton Harbor

1061a

NATIONAL TEA COMPANY

Central-Illinois - 3 Day Delivery

Store No.	Address	Town
313	393 S. Dearborn	Kankakee
314	1717 E. Maple	Kankakee
317	36 Meadowview Center	Kankakee
394	Sauk Terrace & Torrence	Saukville
348	219 East Grant Hwy.	Monee
315	901 Clinton	Ottawa
318	212 Pratt Street	Streator
329	215 East Washington	Morris

1062a

8711 Meadowdale
Detroit, Michigan

KBX23A

AUTHORIZED ITEMS FOR DIRECT DELIVERY - DATE: November 13, 1967

DELIVERED TO:

STORE NAME: K-Mart Foods #54
STREET ADDRESS: 7828 Indianapolis Blvd.
CITY: Hammond, Indiana

BILL TO: Allied Discount Foods
Div. of Allied Supermarkets
P.O. Box 356 R.P.A.
Detroit, Michigan
ATTENTION: Accounting Dept.

FROM:

VENDOR: The Borden Company
STREET ADDRESS: 1821 S. Kilbourn Ave
CITY: Chicago, Illinois
PHONE NUMBER: CR 7-6400
REPRESENTATIVE: W. J. Jensen

☐ NEW LISTING DISTRICT MGR. APPROVAL _____ ☐ REPLACEMENT FORM (Price Change, Etc.)

	ITEM	PACK	SIZE	REG. COST	A.D.F. COST	REG. RET.	A.D.F. RET.
1	Homogenized Milk	Paper	Gal.		.7320		
2	Homogenized Milk (Country Kitchen)	"	1/2Gal.		.3750		
3	Homogenized Milk (Borden's)	"	1/2Gal.		.3750		
4	Homogenized Milk	"	Qts.		.2020		
5	2% Homo Modified Skim Milk	"	Gal.		.7280		
6	2% Homo Modified Skim Milk	"	1/2Gal.		.3540		
7	Buttermilk	"	1/2Gal.		.3750		
8	Buttermilk	"	Qts.		.2020		
9	Skim Milk	"	1/2Gal.		.3430		
10	Skim Milk	"	Qts.		.1790		
11	Dutch Chocolate Milk	"	Qts.		.250		
12	Dutch Chocolate Skim Milk	"	1/2Gal.		.3640		
13	Half & Half	"	Pts.		.2910		
14	Whipping Cream	"	1/2Pts.		.3120		

Please notify this office and local store manager at once on all cost advances and declines.

NOTE: No Payment will be made on items not listed on these forms.

DISCOUNTS & ALLOWANCES: Net XXX 5% discount on all items

PLEASE INDICATE HOW DISCOUNTS & ALLOWANCES WILL BE GIVEN. CHECK ONE OF THE FOLLOWING:

Deducted from Invoice ☐
Deducted from Statement ☐
Paid by separate Check ☐

TERMS: ____ % ____ DAYS NET: XXXX 30 da

If paid by separate check, indicate;
Check will be issued automatically ☐ Monthly

11/1

1063a-1064a

ALLIED DISCOUNT FOODS
8711 Meadowdale
Detroit, Michigan

B

AUTHORIZED ITEMS FOR DIRECT DELIVERY - DATE: November 13, 1967

DELIVERED TO:

STORE NAME: K-Mart Foods #54
STREET ADDRESS: 7828 Indianapolis Blvd.
CITY: Hammond, Indiana

BILL TO: Allied Discount Foods
Div. of Allied Supermarkets
P.O. Box 356 R.P.A.
Detroit, Michigan
ATTENTION: Accounting Dept.

FROM:

VENDOR: The Borden Company
STREET ADDRESS: 1821 S. Kilbourn Av
CITY: Chicago, Illinois
PHONE NUMBER: CR 7-6400
REPRESENTATIVE: W. J. Jensen

☐ NEW LISTING DISTRICT MGR. APPROVAL _____ ☐ REPLACEMENT FORM (Price, Change, Etc.)

	ITEM	PACK	SIZE	REG. COST	A.D.F. COST	REG. RET.	A.D. RET
1	Sour Half & Half	Plastic	16 oz.		.3400		
2	Sour Cream	"	16 oz.		.5140		
3	Sour Cream	"	8 oz.		.2700		
4	Sour Cream Dips	"	8 oz.		.3070		
5	Borden's Swiss Yogurt	"	8 oz.		.2670		
6	Creamed Cottage Cheese	"	2 lb.		.5000		
7	Creamed Cottage Cheese (Plain)	"	16 oz.		.2670		
8	Creamed Cottage Cheese (Flavored)	"	16 oz.		.2670		
9	Creamed Cottage Cheese	"	8 oz.		.1600		
10	Triple Whip	Can	7 oz.		.430		
11	Egg Nog	Paper	Qts.		.45		
12							
13			"				
14							

Please notify this office and local store manager at once on all cost advances and declines.

NOTE: No Payment will be made on items not listed on these forms.

DISCOUNTS & ALLOWANCES: Net 5% discount on all items

PLEASE INDICATE HOW DISCOUNTS & ALLOWANCES WILL BE GIVEN. CHECK ONE OF THE FOLLOWING:

Deducted from Invoice ☐
Deducted from Statement ☐
Paid by separate Check ☒ X

TERMS: ____ % ____ DAYS NET: X 30 da

If paid by separate check, indicate;
Check will be issued automatically ☒ Monthly

1/67

Initial Decision

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Appendix i

[1]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET No. 8866

In the Matter of

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
a corporation, and
BORDEN, INC., a corporation.

INITIAL DECISION

Harry R. Hinkes, Administrative Law Judge

John J. Mathias, Edwin R. Soeffing and Andrew G. Stone, Esquires, Counsel Supporting the Complaint

Cahill Gordon & Reindel,
Attorneys for Respondent, The Great Atlantic & Pacific Tea Company, Inc., New York, New York
Denis McInerney, Raymond L. Falls, Jr., Thomas F. Curnin, Joseph P. Foley and Ira J. Dembrow, Esquires, Of Counsel.

H. Blair White, Theodore N. Miller and Nathan P. Eimer, Esquires, Attorneys for Respondent, Borden, Inc., Chicago, Illinois,
Sidley & Austin, Chicago, Illinois and
Walter W. Kocher, Esquire, Columbus, Ohio, Of Counsel.

PRELIMINARY STATEMENT

This proceeding began with the issuance of a complaint by the Federal Trade Commission on October 8, 1971, against The Great Atlantic & Pacific Tea Company, Inc., (hereafter A&P) and Borden, Inc., (hereafter Borden). The

complaint contains three counts. Count I of the complaint charges that A&P violated Section 5 of the Federal Trade Commission Act as well as the policy of Section 2 of the Clayton Act as amended, in the manner and method by which it negotiated [2] its price on private label milk.[1] The complaint charges that when Borden tendered its final offer to A&P it informed A&P that the offer was being granted for the purpose of meeting competition but that A&P accepted the offer with knowledge that Borden had granted a substantially lower price than that offered by the only other bidder and without notifying Borden of this fact.

Count II of the complaint charges A&P with a violation of Subsection (f) of Section 2 of the Clayton Act as amended by knowingly inducing or receiving discriminations in price which are prohibited by Subsection (a) of Section 2 of the Clayton Act as amended, from its supplier Borden.

Count III of the complaint charges both Borden and A&P with a violation of Section 5 of the Federal Trade Commission Act by a course of conduct constituting a combination between them which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products.

All of the violations alleged in the complaint center about the private label supply agreement entered into between respondents A&P and Borden under which Borden began private label sales to A&P's Chicago Unit's stores on or about November 1, 1965. Such sales continued under the agreement until February 1972. The agreement covered sales of milk and dairy products to more than 200 A&P stores located in a multistate area including portions of Illinois and Indiana.

---

[1] Prehearing conference of May 15, 1973 (Tr. p. 5).

The illegal conduct described in Count I is alleged to have occurred during A&P's course of dealings with Borden leading up to the agreement, which dealings took place from late 1964 up until November 1, 1965. The illegal conduct described in Count II is alleged to have occurred during the same period and also during a later time period when the agreement was in force. In connection with the illegal combination alleged in Count III, complaint counsel limited their main period of proof to include November 1, 1964 through December 31, 1968.

[3] After a number of prehearing conferences, hearings commenced on June 11, 1973 and continued with short interruptions until March 27, 1975 when the record was closed for further evidence.

Not only is this case one of great complexity but its dimensions as well are extraordinary. In addition to the more than 110 hearing days expended, the scores of witnesses heard, the stipulations received, the hundreds of exhibits aggregating about 10,000 pages received, and the more than 11,000 transcript pages of testimony and argument, counsel for the parties have submitted for my consideration briefs totaling more than 2,000 pages which, considering the limited time given for such endeavor, are most commendable.

Any motions not heretofore or herein specifically ruled upon, either directly or by necessary effect of the conclusions in this initial decision, are hereby denied.

The proposed findings, conclusions and briefs as submitted by the parties have been given careful consideration and to the extent not adopted by this decision in the form proposed or in substance are rejected as not supported by the evidence or as immaterial.

References to the record are made in parenthesis using the following abbreviations:

CX—Commission's Exhibit; RAPX—A&P's Exhibit; Ans.—Answer; Tr.—Transcript of the Testimony; DTR—Malone Deposition Transcript, CX 262; Comp. —Complaint; Adm.—Admission.

Having reviewed the record in this proceeding and having considered the demeanor of the witnesses as they testified, together with the proposed findings, conclusions and briefs submitted by the parties, I make the following:

Findings of Fact

A. *A&P's Identity and Business Nature*

1. Respondent A&P is a corporation organized, existing and doing business under and by virtue of the laws of the [4] State of Maryland, with its principal office and place of business located at 420 Lexington Avenue, New York, New York (Comp. Par. 1; Ans. Par. 1).

2. Respondent A&P is now and for many years has been engaged in the operation of a large chain of grocery stores. During the middle 1960's A&P ranked first nationally in terms of sales among retail grocery chains (CX 218G; Smith, Tr. 1340). It operates approximately 4,329 stores in 36 states of the United States, the District of Columbia and Canada. It also operates a number of plants for the manufacture and processing of food and other products handled in its stores including plants which process and manufacture milk and other dairy products. Its annual sales for the fiscal year ending February 22, 1969 totaled over 5.4 billion dollars and, for the fiscal year ending February 1970, totaled over 5.7 billion dollars (Comp. Par. 2; Ans. Par. 1). A&P stores carry a full range of grocery and related products, many of which are purchased by A&P from other national sellers of goods and are shipped to A&P across state boundaries (CX 218E, F;

Smith, Tr. 1387-1388; Schmidt, Tr. 1677-1678). A&P also manufactures and sells many private label products in its stores and did so even before 1965 (Smith, Tr. 1380-1381). It was A&P policy to promote private label products where feasible because their sale usually resulted in larger gross profit, greater attraction of the public to A&P stores and more flexibility for A&P in its dealing with suppliers (Corbus, Tr. 7325).

3. At the time of the private label agreement which is involved in this case, A&P's Chicago Unit encompassed the States of Iowa, Indiana and Illinois (including the Chicago metropolitan area). It operated approximately 260 stores. In 1969, the Unit became a Division which was comprised of 236 stores (Comp. Par. 2; Ans. Par. 1; Schmidt, Tr. 1675; Bartels, Tr. 1853-1854).

4. Products sold through A&P's Chicago Unit stores were procured under the supervision and control of the Head Buyer located in Chicago who, for most of the 1964-1969 period, was Mr. Elmer Schmidt (Schmidt). He was also personally responsible for the Unit's purchases of dairy products [5] except for cheese (Schmidt, Tr. 1667-1669). During the middle 1960's Borden was the principal supplier of dairy products to A&P's Chicago Unit and supplied about 95 percent of that Unit's requirements (Schmidt, Tr. 1678). Sales of dairy products by Borden to A&P's Chicago Unit amounted to millions of dollars annually with purchases of eleven of the most important items amounting yearly to somewhere between 5 and 6 million dollars (CX 263B; Schmidt, Tr. 1679).

5. It was A&P's Chicago Unit which was involved in the private label agreement with Borden here at issue. And although A&P Headquarters in New York gave final ap-

proval to that private label agreement, and reviewed the reliability of the supplier chosen (Smith, Tr. 1347), the private label negotiations themselves were handled primarily at the Unit level (Smith, Tr. 1355-1356; Archer, Tr. 1232-1233). Indeed, it was A&P's Unit Buyer, Schmidt, who was the principal company official involved for A&P in the Chicago private label negotiations (Bartels, Tr. 1865). Schmidt undertook these negotiations as part of a planned move toward private label originating at A&P's New York Headquarters (Bartels, Tr. 1862-1863; Smith, Tr. 1351-1352).

6. The A&P Chicago Unit was one of four Units comprising the A&P Middle Western Division which included among other areas Milwaukee, Wisconsin (Smith, Tr. 1344; Bartels, Tr. 1857). Mr. Ira Bartels (Bartels) was A&P's Director of Purchases for the Middle Western Division from 1964 until 1969 and supervised the activities of Schmidt (Bartels, Tr. 1853-1854, 1858; Schmidt, Tr. 1673-1674).

7. During the middle 1960's A&P was composed of between five and seven divisions consisting in all of 32 Units. In charge of purchases of each Unit was the Unit Buyer such as Schmidt of the Chicago Unit. The Unit Buyer reported directly to the Divisional Purchasing Director, such as Bartels of the Middle Western Division, who in turn reported to the Division President and to the National Purchasing Director located in New York City Headquarters. Similarly, the Unit Sales Manager reported directly to the Divisional Sales Director who in turn reported to the Division President and to the National Director of Sales located in the New York City Headquarters (Smith, Tr. 1336-1337; CX 258). In 1969 the Unit-Division setup was abolished and A&P created 32 Operating Divisions so that the Chicago Unit became

a Division. Bartels was designated Purchasing Manager when the Chicago Unit became a Chicago Division and Schmidt was designated as Buyer and [6] later as Administrative Assistant (Bartels, Tr. 1853-1854; Schmidt, Tr. 1663-1664). When Bartels left the employment of A&P in 1970, Mr. Edmund Bayma (Bayma) became Purchasing Director of the Chicago Division (Bayma, Tr. 5918).

B. *Borden's Identity and Business Nature*

8. Respondent Borden (formerly The Borden Co.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 277 Park Avenue, New York, New York (Comp. Par. 4; Ans. Par. 15-4).

9. Respondent Borden does business throughout the United States and in Canada (Minkler, Tr. 88; Archer, Tr. 1203). As of December 31, 1969 Borden held a 100 percent voting power in about 22 subsidiary corporations and possessed about 200 plants that were managed by four Operating Divisions (Comp. Par. 5; Ans. Par. 15-5). Its Dairy and Services Division conducts a dairy business in which the chief trade name is Borden. Borden's net sales in 1969 as well as in 1970 amounted to over 1.8 billion dollars (Comp. Par. 5; Ans. Par. 15-5).

10. In the course of its business Borden owns, maintains and operates receiving stations, processing and manufacturing plants and distribution depots located in various states from which it sells and distributes its products. Borden sells its milk and other dairy products to various purchasers including retailers. Most of its retailer-customers resell to consumers and certain of its retailer-customers are in competition with other of its retailer-customers (Comp. Par. 8; Ans. Par. 15-8). A&P, whom

Borden served in the Chicago and Northwest Indiana area during all of the time involved in this case, is now and has been in active competition with certain other corporations, partnerships, firms and individuals also engaged in the purchase for resale and resale of grocery and household products including milk and certain other dairy products (Comp. Par. 3; Ans. Par. 15-3; A&P's Adm. dated March 12, 1973, p. 4, 5; Gintert, Tr. 2442; Barney, Tr. 3688).

11. From the early 1960's through the end of 1966 Borden managed certain of its dairy operations through its Chicago Central District or Division which included Chicago, Illinois, the northern part of Illinois, part of Iowa, part of Minnesota, most of Wisconsin, part of Michigan and the [7] northwestern corner of Indiana (Minkler, Tr. 88). The Chicago Central District Management Group consisted in part of Mr. Ralph Minkler, President (Minkler); Mr. Joseph Malone (Malone), Vice President, Regulatory Controls (and formerly Comptroller); Mr. Gordon Tarr (Tarr), Sales Manager for Chain Stores; and Mr. Orville Gose (Gose), Regional General Manager (Minkler, Tr. 88, 111-113; Tarr, Tr. 843; Gose, Tr. 1037). After 1966, Borden's Chicago Central District was merged into its Midwest District in Columbus, Ohio. Minkler retired in December 1966 but Malone, Tarr and Gose remained (Minkler, Tr. 87, 279, 331; CX 262 Malone, DTR. 6, 7; Tarr, Tr. 842; Gose, Tr. 1067).

12. Minkler reported to the President of Borden's Milk and Ice Cream Division in Borden's New York Headquarters. That post was first filled by Mr. Harry Archer (Archer) who was succeeded in the middle 1960's by Mr. Pentz (Minkler, Tr. 98, 126; Archer, Tr. 1203-1205, 1207-1208; CX 292 p. 2). After Chicago Central District's merger into the Midwest Division, Borden's Chicago personnel

reported to Mr. Patterson, President of Borden's Midwest District in Columbus, Ohio, who in turn reported to Borden's New York City Headquarters (Gose, Tr. 1059).

C. *Commerce*

13. A&P admits that it has been and is now engaged in "commerce" as that term is defined in the Federal Trade Commission Act and amended Clayton Act (Ans. Par. 2; Adm. dated September 27, 1972, p. 7, Sec. III, 1-2). A&P also admits transporting across state lines goods which it had produced or processed in one state for sale through its stores in other states. Its Chicago Unit included stores in the states of Illinois, Indiana and Iowa (Schmidt, Tr. 1665, 1674) and advertised in newspapers distributed in both Illinois and Indiana.

14. Borden also admits that it has been and is now engaged in "commerce" as that term is defined in the Federal Trade Commission Act (Adm. filed March 19, 1973, p. 11, Sec. III-3). It also admits that it regularly transported raw milk from one state to another and that its plants received in excess of 10 percent of their raw milk supply from dairy farms in states other than those in which the plants are located (Adm. filed May 5, 1972, pp. 4, 5). Borden advertises nationally (CX 212M; CX 214E). Its Woodstock, Illinois, plant obtains much of its raw milk from Wisconsin (Minkler, Tr. 104). After processing, the milk [8] and dairy products are shipped outside the state and outside the Federal Milk Marketing Order areas. The same Woodstock, Illinois, plant produced substantially all of the private label products sold to A&P under the private label agreement involved here, a great many of which products were then distributed to A&P stores in Indiana (CX 62; CX 263; Adm. filed May 5, 1972, p. 5). In addition to the Woodstock, Illinois, plant, Borden's Chicago

Central District operated milk plants in Indiana, Iowa and Wisconsin (Minkler, Tr. 88).

15. A&P, pursuant to the private label agreement, purchased milk and dairy products from Borden for its grocery stores both within and without the state of Illinois (CX 62; CX 182; CX 187; CX 263). Borden, to fulfill the private label agreement, obtained part of its milk from out-of-state and processed certain milk and dairy products in its plant at Woodstock, Illinois (Adm. filed May 5, 1972, pp. 4-5). Borden then shipped said products across state lines to be delivered to A&P's out-of-state stores.

16. Woodstock, which opened in 1964 and was in full production by 1965 or early 1966, received its raw milk from the Chicago Milk Shed which extends through Wisconsin, Illinois and Indiana (Minkler, Tr. 104-105, 110; Adm. filed September 29, 1972, p. 8, Par. III-5; CX 211B, D, G; Minkler, Tr. 99-100).

17. Borden's practice in connection with its Woodstock operations was to purchase raw milk as needed for the expected demands of its customers, process it and deliver it to its customers as quickly as possible. Milk was not stored at Borden's Woodstock plant more than approximately 24 hours during this process (Borden Adm. dated March 15, 1973, III-28; Minkler, Tr. 108-109). At the processing plant milk was inspected, cooled, standardized and in some cases fortified, pasteurized and homogenized (Minkler, Tr. 107-109; Tise, Tr. 5834-5837). Processing of the major fluid milk items—milks and creams which accounted for over 70 percent of Borden's sales (RAPX 75) —is a nearly instantaneous mechanical procedure which does not alter the product's chemical composition (Tise, Tr. 5834-5837; Graham, Tr. 7078-7079; Minkler, Tr. 107-108). Pasteurization is required before milk can be shipped

in interstate commerce (Tise, Tr. 5829-5830; Graham, Tr. 7072). Borden sells milk to a wide range of customers including retail stores. Such customers are also [9] located in states other than the state of Illinois in which Woodstock is located (Minkler, Tr. 114; Malone DTR. 23-24). A substantial amount of the milk and dairy products processed at Woodstock was distributed through the Hammond, Indiana, Distribution Depot (Minkler, Tr. 102-103; Malone DTR. 26-28). The Hammond Depot primarily served customers in the state of Indiana (Minkler, Tr. 103). Among Borden's customers in this area were a number of A&P stores.

18. All of the acts and practices described above are and were performed in a constant current of commerce with raw milk flowing across state lines into Woodstock and processed milk and dairy products flowing across state lines to Borden's various customers including its largest chain store customer in the area, the retailer A&P.

D. *The Negotiations*

19. In late 1964 A&P decided to explore the possibility of selling private label milk and dairy products in the stores of its various divisions. Mr. Herschel Smith (Smith), A&P's Headquarters Dairy Buyer, held a meeting in New York City at which he explained A&P's new New York private label milk program and instructed the company's divisional purchasing managers to discuss with Unit Buyers the possibility of instituting similar private label programs in their various areas (Smith, Tr. 1350-1352; Bartels, Tr. 1862-1864). A&P's Middle Western Division Purchasing Director, Bartels, attended this meeting. Shortly thereafter and pursuant to these instructions he instructed A&P's Chicago Head Buyer, Schmidt, to initiate negotiations with Borden for private label milk (Bartels, Tr. 1862-1865).

20. Schmidt, A&P's Head Buyer for its Chicago Unit, was in charge and conducted the ensuing negotiations. Bartels, A&P's Middle Western Division Purchasing Director, supervised and was kept informed of Schmidt's over-all activities (Schmidt, Tr. 1668-1669, 1683; Bartels, Tr. 1865-1866; CX 12A).

21. Minkler, the President of Borden's Central District, was in charge of the ensuing negotiations for Borden. Minkler made all the decisions as to what to offer A&P and how to proceed. He communicated with Schmidt or Bartels on important occasions (Minkler, Tr. 123-125, 201-203, 225-228, 247-248; CX 7; Tarr, Tr. 885-887).

[10] 22. Minkler was assisted during the negotiations by Malone, Borden's Central District Vice President for Government Controls and Borden's expert cost accountant. Malone was very knowledgeable concerning all aspects of Borden's production and distribution expenses in the Chicago area and counseled Minkler concerning Borden's costs of serving A&P during the entire course of the negotiations (CX 262, Malone DTR. 6-8, 10-15, 29-32, 39; Minkler, Tr. 111-113, 309-310; CX 42, 54). Malone prepared all of Borden's costs analyses and most of Borden's private label proposals to A&P (CX 14, 18, 21, 23-28, 36, 42, 54, 62, 87). He was extremely well respected and was relied upon by both Borden and A&P officials (Minkler, Tr. 309-310). A&P's Bartels testified: "The Borden Company . . . had . . . very sophisticated cost accounting and legal departments" (Bartels, Tr. 1894A).

23. Tarr was Borden's Central District Chain Store Sales Manager and handled most of the line contact with A&P during the negotiations. Tarr spent about 80 percent of his time servicing the A&P account (Tarr, Tr. 845-846, 848-850, 876-878).

24. Around November 1964, A&P asked Borden to submit a private label offer for Chicago. Minkler and Malone immediately prepared a Borden proposal which granted A&P a 1 cent discount per half gallon of private label milk provided A&P would accept drop delivery and limited service, that is, store door delivery with no in-store service, no special deliveries, and no returns except for inferior or defective products (CX 5, 6; Minkler, Tr. 133-134; CX 262; Malone, Tr. 32-33). The offer was transmitted to Borden's New York office in late November 1964 and turned over to A&P in New York on December 2, 1964. A&P refused this offer (CX 5, 6, 7F, 12; Minkler, Tr. 133-137, 140-142; Archer, Tr. 1209-1212).

25. Although Borden's profit margin in the Chicago area might be cut by a reduction in its price on private label products it could not refuse to make such a reduction because it was dependent on continuing to serve A&P (CX 7D-F).

26. Borden was also concerned with A&P's possible retailing plans for private label milk. A&P was in the [11] initial stages of implementing a nation-wide plan to install private label milk in its stores (Smith, Tr. 1350-1353). In some areas, including Columbus, Ohio, Dayton, Ohio, and Dallas, Texas, A&P had introduced private label milk at a lower out-of-store price than advertised label milk (CX 8G-I; Miller, Tr. 5975-5976, 5978). Smith of A&P had discussed at least some of the cities with Archer in connection with A&P's private label plans for Chicago (CX 7F). Borden felt that if A&P followed this policy and introduced private label milk at such a differential in Chicago a price war would follow and its profits would be destroyed (CX 7D-F; Minkler, Tr. 154-157).

27. Minkler prepared a new private label offer to A&P which granted a 2-cent per-one-gallon price reduction which

Borden tendered to A&P in late January but which was also refused (CX 7G-I, 9, 11, 12).

28. On February 5, 1965, Smith of A&P requested A&P's Chicago Office to take over the negotiations. Bartels turned the matter over to Schmidt and he in turn called Tarr of Borden to request an offer (CX 11; Schmidt, Tr. 1688; Tarr, Tr. 849-851).

29. Schmidt told Borden that "he very much appreciated the sensitiveness of this market". He added that Borden "had to be right" if A&P was not to put its private label business out for bids (CX 12).

30. Borden thereupon prepared a full and complete offer to sell private label milk and dairy products in the Chicago-Calumet area of Illinois and Indiana (CX 14). The Chicago-Calumet area encompassed the A&P stores in the Chicago area, its immediate Illinois suburbs and the Calumet area of Indiana, including Gary and Hammond, Indiana. This area was served by a number of Borden distribution branches including Borden's O'Hare Branch at Irving Park, Illinois, and Borden's Hammond Branch at Hammond, Indiana (CX 262, Malone DTR. 72; Gose, Tr. 1072-1073; RAPX 68). Tarr delivered the offer to Schmidt on February 9, 1965 and discussed it with him (Tr. 850-852). Borden's new offer granted A&P a discount of 2.55 cents per-half-gallon off its then current price and commensurate reductions of the other 5 main items taken by A&P which products accounted for 70 percent of A&P's total sales of milk in the Chicago-Calumet area. Borden also quoted a private label price on 5 by-products. This offer indicated that Borden would realize only .45 cents per-quart gross profit on sales of the main homogenized Vitamin D milk products (CX 14D).

[12] 31. In May, Schmidt asked that Borden come up with a private label program for areas outside of A&P's Chicago-Calumet area. Such outside areas extended north to the Wisconsin state line, west into Iowa, south almost as far as Peoria, Illinois and east beyond South Bend, Indiana to Goshen, Indiana (Tarr, Tr. 856-857; CX 18C, E, G, L). Borden prepared such an offer setting different prices for each zone of A&P's outside areas for each product offered under private label for Chicago (CX 18, 17B, C).

32. A&P was not interested in having only some of its stores in Illinois or Indiana supplied with private label milk. Later, when Bowman was invited to bid, a list of all the A&P stores in Indiana, Iowa and Illinois was given it (Cannon, Tr. 6126-6127). The Dean Dairy was rejected when it bid only on Indiana stores (Schmidt, Tr. 1711). It is thus clear that the private label arrangement of A&P with its supplier was unavoidably interstate in character and that sales of milk to A&P stores in Illinois would be made only if A&P stores in Indiana were also served by the supplier.

33. Borden's May offer (CX 18-0) shows that the dairy expected to lose money on its sales of gallon containers of milk and that its gross profit on half gallons to be only .11 cents. Its total gross profit from sales of the higher volume containers (gallons, half-gallons and quarts) would be only $76.89 per week. The gross profit referred to takes into account only the cost of raw milk, containers, production, route delivery expense and other distribution expense.

34. A&P's business represented more than 55 percent of Borden's wholesale route business in the Chicago area and

25 percent of its Woodstock plant production. Borden could not, therefore, afford to lose the A&P business by refusing to lower its prices to A&P (CX 7F, 42 A-D). At the same time Borden feared that A&P might cut its out-of-store price for private label milk below the market price for advertised label milk (CX 7-D, E; Minkler, Tr. 155-157). Actually, A&P was selling private label milk at a reduced out-of-store price in two out of the three areas studied (CX 8 G-J) and had introduced private label milk at a reduced price in Dayton, Ohio in February 1965 (Miller, Tr. 5975-5976). Consequently, Borden believed that if A&P created such a differential the market price for advertised label milk would break and a price war would result (CX 7E). Such a price war had been experienced by Minkler and Malone in Wisconsin a year earlier and in [13] Chicago during the 1950's (Minkler, Tr. 155-156; Malone DTR 97-99; Soberg, Tr. 2753, 2754-2764). Such a price war would not only reduce profits of all dairies in the area but Borden particularly, because of its investment in the new Woodstock plant which cost over five million dollars (CX 13J). Many of the other dairies in this area were older and fully depreciated and thus had substantially lower fixed costs (Schaub, Tr. 3110-3111). Thus, if Borden reduced its price and A&P followed suit at retail level for private label milk, a price war might ensue and reduce Borden's profit. If Borden refused A&P's request for lower prices Borden would lose A&P's business and the volume necessary to operate Woodstock efficiently. Neither position was desired.

35. On May 25, 1965, Tarr and Malone delivered Borden's offer for the outside areas to A&P and discussed Borden's position with Schmidt (CX 19A). Borden pointed out that it expected almost no profit from the A&P contract but that it was presenting such a bid because A&P's

business was vital to Borden's efficient use of its Woodstock plant. Schmidt pointed out that A&P's goal in its private label program was to increase its gross margin on milk. The Borden representatives, however, warned that this could not be accomplished if A&P reduced the price on private label milk, citing a price war that had occurred in Wisconsin as the result of private label pricing (CX 19E, F; CX 262; Malone DTR 97-98).

36. In July 1965 A&P asked Borden to revise its May quotations for the outside areas to take account of possible savings in delivery costs. On July 26, Tarr delivered the revised quotation to Schmidt (Tarr, Tr. 863-865; CX 21).

37. On July 26, 1965, Bartels of A&P met with Minkler to discuss Borden's costs and to push for lower prices. Bartels wanted to know why Borden's Chicago costs were higher than its New York costs and Minkler agreed to review the matter (Tarr, Tr. 863-869; CX 21, CX 22A-D, CX 25B).

38. Malone prepared a written response to Bartels' questions (CX 23-25A). This response indicated that the primary reason for Borden's higher costs in Chicago was that Borden's Chicago delivery costs were higher in that the Chicago dairy drivers were paid substantially more than their New York counterparts; that union limitations on types of delivery and stricter health regulations limited efficiencies in delivery in Chicago; that A&P stores in New York made larger average purchases; and that there was a greater density [14] of A&P stores in New York. Malone concluded that Borden's gross margin per quart would be .36 cents not .45 cents as previously calculated and pointed out that this margin figure did not include anything for either overhead or burden (CX 23C-G, 24D). This cost study was submitted by Minkler and Malone to

Bartels on August 6, 1965, and discussed with him (Minkler, Tr. 202-203; CX 262, Malone DTR 114).

39. Again, in August, A&P requested Borden to lower its offering price on some of the by-products. On August 13, Tarr presented Schmidt with a new revised bid for both the Chicago-Calumet area and A&P's outside areas (CX 31, 36, 37). The new bid focused on A&P's profit as a result of the private label contract indicating that A&P's costs would be reduced some $410,000 (CX 37 A-F, CX 36; Tarr, Tr. 869-871).

40. Nevertheless, Schmidt told Tarr that A&P was not satisfied and had decided to put the matter out for bids (Tarr, Tr. 871-873). Tarr had told Schmidt at various times that some dairies in the area might bid under their cost to get A&P's business (Tarr, Tr. 872). On August 18, 1965, Minkler told Bartels that other dairies might submit bids which included only out of pocket or direct costs leaving out all fixed charges, on the theory that these costs were already covered by their present business (Minkler, Tr. 213-214). Nevertheless, Bartels indicated that he was proceeding to get other bids.

41. Malone calculated that if Borden lost A&P business Borden's gross profit would be reduced more than 1.6 million dollars per year compared to the private label price reduction of some 400 thousand dollars (CX 42A-D, CX 262, Malone DTR 122-123).

42. During the latter half of August A&P asked Bowman Dairy, Dean Milk Co. and Sidney Wanzer & Sons to submit bids for A&P's business. Wanzer was not interested and the Dean Milk Co. submitted a bid for a part of Northern Indiana only, an area which A&P did not want

served separately from Chicago (CX 45, 51A-C; Schmidt, Tr. 1711).

43. Bowman Dairy submitted an offer to A&P (CX 50). Schmidt immediately telephoned Tarr and told him that Borden's bid was "so far out of line that it is not even funny. You are not even in the ball park . . . this bid is so far different from yours that there isn't any comparison" (Tarr, Tr. 873-874). Schmidt added that even if Borden's promotions and other assistance were valued at $50,000 per year "this would not be a drop in the bucket" (Tarr, Tr. 874).

[15] 44. The next day, September 1, 1965, Schmidt met with Tarr and told him that the new development was "terrible" and that Borden's bid was "nowhere near", to which Tarr replied that some bids might "be screwy" and that he didn't see how anyone can sell any cheaper than Borden (Tarr, Tr. 873-874).

45. Malone had computed what a bid based upon direct costs only would be. Borden also knew that losing the A&P account would cost it about 1.6 million dollars per year. As Minkler explained (at Tr. 225-226):

> This became not a matter of logic in many respects. It was a matter of struggling to try to guess again what might have been put in there by a competitor. I must tell you that it was just largely [pure] guess. We had the $410,000 [bid] in, we were clearly told that an additional $50,000 wouldn't begin to cover the difference, there are [the] facts that we had to consider.
>
> In addition to that, we had this figure of one million six hundred some thousand dollars that it would cost us if we lost the business. We had to weigh that, and

at some point, I said that it seemed to me that we had to consider doubling this $410,000 figure, and you could ask me all night how I arrived at that, and I wouldn't be able to tell you except that we were just determined that we had to save this volume for this brand-new plant that we were just bringing on stream.

We were really desperate and by that time, we were pretty well convinced that the approach by the competitor had been on an anyhow accounting basis, they were going to get it and correct their problem later on, we rationalized, so I again got New York on the phone and got their clearance if I thought this was all that could be done to go ahead.

I was told, save the business. . . .

46. On September 8, 1965, Minkler and Tarr met with Schmidt to discuss a further Borden bid (CX 55E). Schmidt [16] "reiterated the conversations almost verbatim that he had with [Tarr], that [Borden's offer] wasn't even in the ball park, and how shocked and surprised he was at our company trying to go along with such a low bid when someone else was bidding and . . . the whole thing" (Tarr, Tr. 876-887; Minkler, Tr. 226). Minkler offered to submit a new quotation which would yield A&P a saving of $820,000 per year, double the saving of Borden's then current bid. Minkler stated that this offer was made "on the basis of meeting competition" (Minkler, Tr. 227-228). Minkler also stated his belief that the bid submitted by Borden's competitors probably took only direct costs into account and were based upon "anyhow accounting" but that Borden could not lose A&P's business (Minkler, Tr. 227-228, 237-238, 376-377). Schmidt said "now you are in the ball park" and asked Minkler and Tarr to go back, spread the new savings figures to Borden's product line and write up a form of service (Minkler, Tr. 243-244; Tarr, Tr. 878-879).

47. During the following week Borden worked up a formal quotation including the 11 items previously offered under private label as well as glass gallons of homogenized Vitamin D milk and 2 percent milk. Tarr told Schmidt of this change in the offer and Schmidt said such change would be fine (Tarr, Tr. 880-882; Minkler, Tr. 244-245). The new bid was submitted to Schmidt's assistant by Minkler and Tarr on September 17, 1965 (CX 56, 57, 58; Tarr, Tr. 883; Minkler, Tr. 245).

48. Shortly thereafter, Schmidt called Tarr to reject the offer telling Tarr that Borden's bid was not fair to the other bidders who "did not bid on glass gallons" (Tarr, Tr. 883-884; Minkler, Tr. 245). However, the Bowman Dairy offer *had* specified glass gallons of milk (CX 50). Actually, A&P did not want to sell private label milk in glass containers (Schmidt, Tr. 1777-1780). Schmidt also told Tarr that Borden should "sharpen your pencil a little bit because you are not quite there" as a result of which Borden reduced its price somewhat (Tarr, Tr. 884-885, 963-965).

49. The Bowman bid was apparently based upon volume and A&P did not ascertain how a different volume would affect that Bowman bid except to determine that if Bowman sold less volume to fewer stores its prices would go up (Schmidt, Tr. 1760-1761). The Bowman bid also assumed certain possible days of delivery in the Gary-Hammond area. A&P did not ascertain how a change in such assumption would affect this offer.

[17] 50. Borden prepared a corrected bid spreading the 820 thousand dollars to the original 11 item private label product line (CX 62). Using the raw milk prices as of the first half of 1965, the savings to A&P would have been over

880 thousand dollars but since the raw milk prices had risen in the meantime the actual savings would be about 820 thousand dollars (CX 66B). The new bid reduced Borden's price for a half gallon of milk by 5.75 cents below its then current advertised label price to A&P and by about 3.2 cents below Borden's July 26 prices, the last price Borden had made any effort to cost justify (CX 62, CX 21).

51. Minkler and Tarr presented Borden's final bid on September 21, 1965. Minkler told Schmidt:

> . . . I said, "Elmer, there is certainly something here that I want you to very definitely understand." I said, "This price is given to you by us on the feeling and belief that *we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis.* You must make that clear to your superiors and to your legal people. I don't know what may come of this in the future, but I want you to understand this [:] we are going to say always that we felt we were meeting a competitive offer that you had received from someone else." And he said to me, words to the effect, "Ralph, you don't need to worry. I read you loud and clear. I understand what you are saying. My superiors and our legal department will understand it." And he says, "Just don't worry about it." (Minkler, Tr. 247-248; emphasis supplied).

52. Mr. Tarr, a witness to the meeting, testified to the same effect:

> At the last of it, Mr. Minkler said, and I can't give you his exact words, but in effect he said, "Now, Elmer, look, we have met a competitive situation here on this bid, on this quote. You know that. This is right, isn't it", and Elmer said "Yes." (Tarr, Tr. 886; also see Tr. 1020).

[18] 53. Minkler also told Schmidt that the new bid was based upon "anyhow accounting" (CX 63A-D). Schmidt admitted that Borden told him on this occasion and in many other conversations that the final bid was based upon "meeting competition" (Schmidt, Tr. 1782-1801).

54. Schmidt requested a letter from Borden stating that its prices were proportionately available to others (CX 66). Instead, Borden supplied a letter which stated only that Borden felt its prices were legal and that it was prepared to defend them (RAPX 2). This letter was not in Borden's usual form relating to offers which were available to others (Archer, Tr. 1254-1255, 1258). Herschel Smith, A&P's Headquarters Dairy Buyer, understood that Borden's letter did *not* say its prices were available to others (Smith, Tr. 1427-1429, 1438-1440).

55. Schmidt submitted Borden's new bid and Bowman's bid to Bartels noting that Borden's bid offered a savings of 820 thousand dollars while Bowman's savings amounted to some 737 thousand dollars. Schmidt recommended retention of Borden as did Bartels who forwarded it to Smith in New York (CX 66A-B, CX 65A-C; Schmidt, Tr. 1713-1716; CX 263). Smith noted that Borden's offer was "substantially better" than the one from Bowman and approved Borden on October 14, 1965 (Smith, Tr. 1369, 1413-1414; CX 263, 70). Borden commenced serving A&P in its Chicago area in November 1965 (CX 75A-J, 255B).

56. During mid-November 1965 Borden brought its service and delivery terms to A&P on Borden label products in line with those granted on A&P label products but at a substantially lower discount (RAPX 66). Thus, during 1966 and thereafter Borden's maximum discount to A&P taking the same service on Borden label products was 30 percent while A&P's private label discount was 35 to 38 percent.

57. On May 24, 1966, Borden increased its Borden label list price by .5 cents per point[2] to reflect its increased container, labor and social security costs. At Borden's maximum discount of 30 percent this increase raised Borden's prices by .35 cents per point (CX 124, 125, 139, 140, 123, 138; Gose, Tr. 1110). Borden informed A&P of the price increase [19] and asked that A&P accept a commensurate increase on A&P label products (CX 79; Gose, Tr. 1050-1054; CX 262, Malone DTR 178-180). A&P accepted the increase on Borden label products but refused to accept it on private label products (CX 81; Gose, Tr. 1053-1054; CX 255B). The contract on private label provided that prices were to be subject to change to reflect increased container and labor costs (CX 62H-J, M).

58. Again, in March 1967, Borden asked A&P to accept the price increase to reflect cost passed on to Borden's other customers in 1966 pointing out that all of its other customers had accepted the price increase (Gose, Tr. 1056-1062; CX 102-103, 105, 106). A&P refused to accept more than a .2-cent per-point price increase on private label products (CX 102B, 106C, 110, 225B; Gose, Tr. 1058).

59. After the institution of the private label agreement with A&P, Borden reorganized its Chicago Central District merging it with another district. Minkler explained that this was necessary because of the reduction in income occasioned by the lowering of its price to A&P on private label products by some 800 thousand dollars (Minkler, Tr. 276-280). Job positions involving almost all facets of the Borden operation were eliminated within the Chicago region following the beginning of the Borden-A&P private

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[2] A point is equivalent to a quart of whole milk. Thus a gallon is measured as four points and a half gallon as two points. Some other dairy products have different point values.

label arrangement due, at least in part, to that new arrangement (Gose, Tr. 1069-1070).

E. *Grade and Quality*

60. Respondent A&P admits:

> [S]ubstantially all of the fluid milk products Borden supplied under A&P's private label to A&P stores [in the area of complaint counsel's proof] during the period November 1965-1970 were physically and chemically identical to the equivalent products contemporaneously sold under the Borden label to these A&P stores and to other stores in the "Chicago and suburbs", Gary, Hammond and Valparaiso areas (A&P's Adm. Filed March 12, 1973, Par. III-6).

Borden admits substantially the same thing (Borden Adm. filed September 29, 1972, Par. III-10; Minkler, Tr. 250; Schmidt, Tr. 1727-1729).

F. *Contemporaneous Sale*

61. Respondent A&P admits that the fluid milk and dairy products sold by Borden under private label to A&P stores [20] in the area in question and contemporaneously under Borden label to competing retailer-purchasers, were commodities sold for use, consumption or resale within the United States (Comp. and Ans. Pars. 8, 9; A&P Adm. Par. III-6).

G. *The Discrimination*

I. *The Gary-Hammond and Valparaiso Areas of Indiana*

62. Burger's Super Markets, Inc., operated a supermarket in Hammond, Indiana, which competed with the A&P stores in Hammond, Indiana (A&P's Adm. Par. III-9

(a)-(e); White, Tr. 2064-2065; Kristoff, Tr. 2285-2286). Burger's store purchased about two to five times as much milk from Borden as its A&P store competitors (CX 182; RAPX 234 p. 19) and was substantially larger than its A&P store competitors in Hammond (Kristoff, Tr. 2270-2271, 2381, 2385).

63. Model Food Center, Inc., operated a super market in Hammond, Indiana, also. A&P admits that the Model Food Center in Hammond, Indiana, competed with its A&P store #306 in the Hammond suburb of Munster, Indiana (A&P Adm. Par. III-9(a)-(e)). Model Food Center purchases of fluid milk products from Borden were commensurate with the A&P stores in the Gary-Hammond area with which it competed (CX 182; Barney, Tr. 3682-3688).

64. Wallies Market in Hammond, Indiana, purchased fluid milk and dairy products from Borden from 1966 until December 1, 1969. A&P admits that Wallies Super Market competed with one of its stores (A&P's Adm. Par. III-9 (a)-(e)). Wallies bought approximately the same amount of milk from Borden as its A&P competitors during the period 1966-1969 (CX 182).

65. Wilco Food Center is a supermarket in Gary, Indiana. A&P admits that during the period 1964-1970 Wilco Food Center competed with one of its stores in Gary (A&P's Adm. Par. III-9(a)-(e)). Wilco bought substantially more than twice as much milk from Borden as the average A&P store in the Gary-Hammond, Indiana area (CX 182).

66. Joseph Tittle & Sons, Inc. (Tittle) operates and has operated a chain of supermarkets in Northwestern Indiana for many years. Between October 1966 and March 1967 Tittle owned and operated five supermarkets in this area,

two in Gary, Indiana (Lake Street and Village Court), one in Hammond (Hohman), one in a suburb of Hammond (Highland), and one in Valparaiso, Indiana. Between 1967 and 1969 [21] Tittle sold its Hohman store and moved its Village Court store to another location. Consequently, between 1969 and 1970 Tittle had two stores in Gary, one in Highland and one in Valparaiso. A&P admits that the Tittle stores competed with its A&P stores in such areas (A&P Adm. Par. III-9(a)-(e); Minard, Tr. 3136-3138, 3141-3148). The Tittle stores in Gary bought approximately the same volume of milk from Borden as the A&P stores in the area. In Hammond the volume of the Tittle stores was lower than the volume of some A&P stores but higher than others. In Valparaiso the Tittle Store's volume was at least three times more than that of the A&P store (CX 182).

67. Burger's Market bought slightly more than 28 thousand dollars worth of milk products from Borden between October 1966 and March 1967. Had it been charged A&P's prices under A&P's private label agreement with Borden, Burger's Market would have paid $3,468.77 less. It, therefore, sustained a price discrimination of 14 percent. Between June 1969 and March 1970 it bought over 84 thousand dollars of milk products from Borden but would have paid $11,506.15 less had it been charged A&P's prices under the private label agreement, sustaining a 15.7 percent price discrimination (CX 187, 188A).

68. During the same two periods Model Food Center was charged $12,496 in the earlier period and $29,519 in the later period. Had Model been charged A&P prices under its private label agreement with Borden, Model would have saved $2,297 in the early period and $4,138 in the later period, thus experiencing a price discrimination of 22.5

percent in the early period and 16.3 percent in the later period (CX 191A, 187).

69. Wallies Market bought more than $14,000 worth in the early period and a similar amount in the later period. Had it been charged A&P prices under the private label arrangement it would have saved $2,193 in the earlier period and $2,203 in the later period reflecting a price discrimination of 17.5 percent for the early period and 17.6 percent for the later period (CX 200A, 187).

70. The Wilco Food Center paid more than $35,000 for milk products in the same earlier period and more than $71,000 in the later period. Had it been charged the A&P prices under the private label agreement with Borden it would have [22] saved $4,550 in the earlier period and $4,433 in the later period. The price discrimination amounted to 14.5 percent in the earlier period and 6.6 percent in the later period (CX 202A, 187).

71. Tittle's Lake Street store paid more than $13,000 for milk products in the earlier period and more than $32,000 in the later period. Had it been charged the A&P prices under the private label agreement with Borden it would have saved $1,571 in the earlier period and $1,939 in the later period. The price discrimination was 12.9 percent for the early period and 6.4 percent for the later period (CX 196A, 187).

72. Tittle's Village Court store paid Borden more than $12,000 for fluid milk products in the earlier period and more than $38,000 during the later period. Had it been charged the A&P prices under the private label agreement with Borden, it would have saved more than $1,400 in the earlier period and more than $1,800 in the later period,

sustaining a discrimination of 12.5 percent in the earlier period and 5 percent in the later period (CX 197A, 187).

73. Tittle's Supermarket on Hohman Avenue in Hammond, Indiana, paid more than $15,000 to Borden for fluid milk products during October 1966-March 1967. Had it been charged A&P's private label prices from Borden, it would have paid more than $1,800 less, reflecting a 13 percent discrimination during that period (CX 195A, 187).

74. Tittle's Supermarket in Highland paid more than $12,000 for fluid milk products bought from Borden during the early period or almost $1,400 more than it would have paid had it been charged A&P's private label prices from Borden. This amounted to a 12.4 percent discrimination. During the later period of proof this store paid more than $23,000 for fluid milk products but would have paid $1,335 less had it been charged A&P's private label prices from Borden, thus experiencing a 5.9 percent discrimination (CX 194A, 187).

75. Tittle's Supermarket in Valparaiso bought approximately three and one-half times as much milk from Borden as the competing A&P store (CX 182). Nevertheless, during the first period it paid more than $51,000 for fluid milk products bought from Borden which was $7,603 or 17.5 percent more [23] than it would have paid had it been charged A&P's private label prices from Borden. During the second period of proof, it paid more than $111,000 for such products or $6,984 or 6.7 percent more than it would have paid had Borden charged it A&P's private label prices (CX 198A, 187).

76. Combined, the Tittle stores paid $13,804 during the earlier period in excess of what it would have paid had it been charged A&P's private label prices from Borden. This

was an average of 15 percent more. During the later period the Tittle stores paid $12,104 more or 6.3 percent more than it would have paid had it been charged A&P's private label prices (CX 187).

77. The unfavored competitors described above purchased from Borden at lower discounts and at higher prices than enjoyed by A&P as a result of Borden's formula for pricing A&P private label products. This situation commenced with the institution of the private label program in 1965 and continued until it ended in February 1972 (RAPX 66; CX 187, 120-136, 288, 289; Bayma, Tr. 5932-5933; Kristoff, Tr. 2279; Barnes, Tr. 3852, 3914; Minard, Tr. 3155-3156).

II. *The Chicago and Suburbs Area*

78. A&P sold fluid milk and dairy products in all of its stores of the Chicago area as did all of Borden's other store customers in that area (CX 256, 183). Two of such other Borden's store customers were Mayfair Foods and Jim's Groceries, who competed with A&P stores in that area during February and March 1966.

79. A&P admits that its store No. 137 located approximately two blocks from Mayfair Foods drew customers from the area served by this independent food store (A&P's Adm. filed March 12, 1973, Par. III-11). This was corroborated by the store manager (Lasorso, Tr. 2644, 2646, 2686) who testified that he regularly compared his prices with the prices charged by A&P, and adjusted his prices in response to those of A&P. Customers of Mayfair and A&P shopped both stores.

80. Jim's Groceries was a member of Central Grocers Cooperative and was also known as Centrella store. It was located in Oak Park, Illinois, where it competed with

A&P for the sale of fluid milk and dairy products during 1965 [24] and 1966 (A&P Adm. Par. III-11). This is confirmed by the owner of Jim's Groceries (Cox, Tr. 3946-3948) who testified that he checked A&P's prices in setting his own prices and that A&P was a competitor.

81. Borden's price to A&P on A&P label products in the Chicago and suburbs area in February and March 1966 was equivalent to a discount from list price of about 36.6 percent (CX 183). In May 1966 Borden imposed a price increase on Borden label products but A&P refused to accept it on the private label products (Gose, Tr. 1052-1054) and thus A&P's effective discounts from Borden's list prices rose to 37.8 percent as of August 1966 (CX 180). This continued until April 1967 when A&P accepted a partial price increase.

82. Borden's discount schedule in January 1966 established a maximum discount on Borden label products of 30 percent off of list (CX 138) which discount was available only to customers taking 600 points or more per delivery and the same service as granted to A&P. Although CX 138 states Borden's maximum discount to be 28% for such customers, Borden also offered an additional 2 percent discount if the store was centrally billed (Gose, Tr. 1110).

83. During February 1966 Mayfair Foods purchased milk and dairy products from Borden in the amount of $2,736 and received a rebate of $818 or 29.9 percent of the list price. During March 1966 Mayfair Foods purchased $3,056 of such products and received a rebate of $915 or 30 percent of the list price. During the same two months the A&P store with which Mayfair competed paid a net price which reflected a discount of about 36.6 percent of its private label purchases or 6.6 percent additional dis-

count above and beyond that granted to Mayfair Foods (CX 183).

84. Jim's Groceries' purchases of milk and dairy products in February and March 1966 totaled $2,269 and $2,661, respectively. Borden's rebates totaled $522 and $607 or 23 percent and 22.8 percent respectively for those months (CX 183), which was in accordance with Borden's published discount schedule since Jim's Groceries took only about 400 points per delivery and did not take limited service or central billing (RAPX 173, pp. 82, 84). The A&P stores in Oak Park paid a net price which reflected an effective [25] discount of about 36.6 percent during this period. These A&P stores were about the same size or smaller than Jim's Groceries, taking about 251 points and 419 points for each of the two stores (RAPX 173, pp. 109, 116, 118). Even if the A&P stores qualified for an extra 2 percent discount for limited service and another 2 percent for central billing, these stores should have been receiving discounts of only 23 and 28 percent, respectively, not the maximum 30 percent discounts set out on Borden's discount schedule or 36.6 percent they actually received. The discrimination thus experienced by Jim's Groceries exceeded 10.4 percent.

85. The five highest volume items under the private label contract were homogenized milk quarts, homogenized milk half gallons, homogenized milk gallons, 2 percent milk half gallons and skim milk half gallons. These items accounted for 80 percent of Borden's expected sales to A&P pursuant to the private label contract (CX 65). As will be seen from the attached Appendix, Borden's discriminations in favor of A&P on these items ranged from a low of 8.3 percent for quarts of milk to 18 percent or more on half gallons of skim milk. Borden's discrimination on half gallons and gallons of milk which accounted for more

than 55 percent of Borden's sales to A&P range from 9.7 percent to 14 percent.

H. *Injury to Competition*

The attempt to discern the competitive effect of price discrimination has been said to be "roughly akin to explaining how to avoid harm in a snake pit" (Keck, Lawful Price Discrimination, 8 AntiTrust Bull. 381 (1963)). Here, however, the task is simplified.

86. As A&P admits, "fluid milk is one of the most important commodities carried in retail grocery stores . . . [I]t is a perishable, high-volume, fast turnover item sold by most food retailers. Milk is also a staple and is purchased [by consumers] more frequently than other products [sold in grocery stores]" (A&P Adm. filed March 1, 1973, Par. III-19, 24). This is confirmed by the testimony of non-favored Borden customers (Minard, Tr. 3149); Kristoff, Tr. 2274; Gintert, Tr. 2456; Barnes, Tr. 3861; Barney, Tr. 3686; Lasorso, Tr. 2650; Cox, Tr. 2951-2952). Consumers are familiar with the retail price of fluid milk products and consequently competing retail grocers price milk competitively (A&P Adm. filed March 1, 1973, Par. III-21; Minard, Tr. 3149; Kristoff, Tr. 2277; Gintert, Tr. 2447-2448; Barnes, Tr. 3861-3862; Barney, Tr. 3690; Lasorso, Tr. 2650; Cox, Tr. 3947-3951). Milk products are sometimes used as [26] price leaders which are priced below the normal market price to draw customers to a store where it is hoped the customer will purchase additional products (Minard, Tr. 3153-3154; Kristoff, Tr. 2277-2278; Gintert, Tr. 2458; Barnes, Tr. 3862; Barney, Tr. 3691-3692; Lasorso, Tr. 2652-2653). Selling milk at higher prices than those charged by one's competitors would cause customers to shop at other stores and would hurt business (see foregoing citations).

87. A&P admits that profit margins have been notoriously low in the retail grocery business (A&P Adm. filed March 1, 1973, Par. III-23). This is confirmed by sales and profits summaries of the unfavored competitors of A&P (CX 184, 189, 192, 199A, J-Z, 201, 203). All of the unfavored competitors had pre-tax net profits of less than 5 percent of sales. Four of them had net profits of 2.3 percent or less and one had a net profit of less than 1 percent (see Appendix IV *(in camera)* submitted in complaint counsel's proposed findings).

88. In view of the consumers' consciousness of fluid milk prices, the importance of milk to the grocery store, and the low level of their profit on sales by grocery stores, the purchase price of fluid milk items has been important to the ability of food retailers to price these items at competitive levels. The unfavored competitors of A&P, had they received a larger discount from Borden on milk products, would have increased their net profits and permitted them to be more competitive. Some of them would have been able to lower the retail price of milk to the consumer, increase advertising or otherwise give better service (Minard, Tr. 3154; Kristoff, Tr. 2273, 2278; Gintert, Tr. 2455-2460; Barnes, Tr. 3860-3861; Barney, Tr. 3688; Losoro, Tr. 2653-2657; Cox, Tr. 3950-3951). The price discriminations experienced by the unfavored competitors on their purchases of milk and milk products from Borden when compared with A&P's prices on private label was at least several times larger than those stores' level of net pre-tax profit. In many cases the percentage of discrimination was as high or higher than the stores' level of gross profit on sales. Consequently A&P enjoyed a competitive advantage. Since it did not reduce the retail price of its private label milk, its lower costs were not passed on to the consumer but resulted in higher gross profits for itself (CX 255B; White, Tr. 2059).

[27] I. *A&P's Inducement or Receipt of Borden's Private Label Pricing*

89. There can be little doubt that A&P induced Borden into granting the private label prices. Its behavior as outlined in the section of this decision dealing with the negotiations clearly demonstrates that A&P maintained unwavering pressure upon Borden to arrive at the prices finally agreed upon. It solicited a private label arrangement, first only for its Chicago-Calumet area, then later for its outside areas, it hammered down Borden's successive bids and even when it was informed that the bid was at or close to Borden's costs put the matter up for outside bids. It then informed Borden that its bid was not even "in the ball park." Finally, Borden, desperate to retain A&P business for its new Woodstock plant, made a bid which A&P could not refuse and the deal was closed to begin in November 1965 and to last until February 1972.

J. A&P's Knowledge that Borden's Bid was not Cost Justified

90. As detailed earlier in the section of this decision entitled Negotiations, A&P was made aware that Borden's price could not be cost justified. Borden repeatedly told A&P that its price was based solely on meeting competition and that it was intended to meet a competitive bid based on incremental costing. Moreover, Borden first offered A&P an $820,000 savi[illegible] covering 13 private label items with an annual volume of $6.5 million. When A&P insisted that Borden drop its glass gallon feature, Borden revised its bid to cover 11 private label items with an annual volume of only $5.6 million (CX 56B-G, 62, 75F-J; Tarr, Tr. 884-885; Schmidt, Tr. 1777). A&P should have known that the same cost savings applicable to different products with different volumes would not likely be related to Borden's cost savings.

91. The study of Borden's Chicago-Calumet area costs in July 1965 was made by Borden's cost accountant, Malone, and was submitted then to A&P. This showed Borden's cost on gallons, half-gallons and quarts of milk to be higher than the final price per unit to A&P (CX 24D, 62C). Even when these costs were computed in February 1965, the final prices offered A&P for the two highest volume items, half-gallons and gallons of milk, were lower than Borden's cost (CX 14D).

[28] 92. Borden also told A&P that its cost of serving A&P stores outside of A&P's Chicago-Calumet area were higher than its prices. Borden reported its costs for the major whole milk items as follows:

Half-gallon	$.3167
Gallon	$.6260
Quart	$.1584 (CX 21U)

Borden's final offer was substantially below these costs, particularly for half-gallons and gallons (CX 62D-G). A&P should have known that Borden's costs were higher than the final price quotation. In May 1965 Borden's Mr. Malone spoke with A&P's Mr. Schmidt about Borden's costs and showed Schmidt that Borden's gross profit per quart was less than one mill (CX 19E). At that time Borden's cost for paper half-gallons of milk was $.3162. Borden's final price, averaged, was $.2866 for half-gallons in the outside areas.

93. Mr. Bartels also knew of Borden's costs having been presented with Malone's calculations (Bartels, Tr. 1869; Minkler, Tr. 203; Malone DTR p. 114).

94. It is also of significance that when A&P asked Borden for a letter stating that its private label prices were

granted to others on a proportional basis, a statement which would have been in conformity with A&P's policy of obtaining such a written statement from suppliers (Smith, Tr. 1428), Borden replied

> . . . Our prices are proper under applicable law and we are prepared to defend these prices (CX 263H).

95. A&P's Chicago officials made no effort to determine if Borden's private label prices were to be made available to others (Schmidt, Tr. 1729; Bartels, Tr. 1877).

96. It does not appear that A&P's New York office made any such inquiry (Archer, Tr. 1251). A&P's headquarters buyer for milk and dairy products who reviewed the Borden offer for legality (Smith, Tr. 1347) testified that he understood that Borden's letter did *not* state that Borden's prices were available to others on proportionately equal terms and was *not* the letter of availability that A&P [29] had asked for (Smith, Tr. 1406). He further testified, however, that he telephoned Mr. Archer, and held a conference with him about the Borden letter but that Archer assured him that the letter was a letter of availability and even more (Smith, Tr. 1407). Whereupon, he sent the Borden offer, their letter and a memorandum to A&P's legal department for review and that the legal department responded in writing (Smith, Tr. 1413, 1442). Archer, however, testified that he had no discussions with Smith regarding Borden's final Chicago quotation (Archer, Tr. 1246). Neither Smith's memo to the legal department nor the alleged legal departments' approval were offered in evidence. On balance, I do not credit Smith's version of the actions taken after the receipt of Borden's final offer.

97. A&P's trade experience also should have given it reason to believe that Borden's final price could not be cost justified. It was quite familiar with the dairy industry

and methods of doing business in the industry at the time of the private label negotiations. Their officials had discussed private label milk for Chicago, the pricing of private label milk, Borden's pricing in the market, dairy pricing in the Chicago area as compared to pricing in other cities, private label pricing in other markets, competitive conditions, Borden's costs, etc. (Minkler, Tr. 201, 213, 227; Tarr, Tr. 857, 871, 897; Schmidt, Tr. 1684, 1687, 1692; Bartels, Tr. 1865; Smith, Tr. 1350; CX 7D-K, 12, 19, 22, 25B-E, 30, 31, 34, 43). Admittedly, one of its purposes in seeking private label milk for the Chicago area was to cut its cost of milk below the price it paid for Borden label products (Corbus, Tr. 7325; Smith, Tr. 1400). A&P also purchased fluid milk and dairy products in the Chicago area from other dairies in addition to Borden and must have been aware of the price level for these dairies (CX 256). It also knew that Borden's final private label price to A&P was substantially below Borden's advertised label prices to A&P since it was buying both from Borden.

98. Even A&P's costing guide lines indicated that Borden's private label prices had to be below Borden's cost. In 1964, A&P negotiated for the supply of private label milk by Glen & Mohawk Milk Associates for areas in upstate New York and Massachusetts. The president of that dairy told [30] A&P how a store customer could estimate a dairy's cost. He said that it could sell milk to A&P stores at a cost of approximately 6¢ per quart above the dairy's cost of raw milk. Two of such 6¢ went for cartons or fillers. Two more cents were attributable to plant costs and profit and the last two cents would cover delivery (Abrams, Tr. 6398-6399). Nevertheless, Glen & Mohawk's prices ranged from .28¢ to .65¢ per quart more than the prices Glen & Mohawk told A&P it might expect (RAPX 137A, 62, 63). Moreover, the 2¢ figure for plant costs would not necessarily apply in New York City because wage rates

were higher there than those used in the formula (Abrams, Tr. 6402-6404, 6423). In addition, Glen & Mohawk's offer did not include milk delivery but was a dock pick-up price and did not guarantee delivery costs, the customer taking the risk of delivery (Abrams, Tr. 6388). Glen & Mohawk's delivery cost estimate would not necessarily apply in areas with different union wage rates and was based on an average per store delivery of at least 40 to 50 cases (Abrams, Tr. 6399-6401, 6425-6426). Finally, delivery costs were for sidewalk drop delivery and not for putting milk into the store (Abrams, Tr. 6396). In sum, the "2-2-2 formula" was merely a reference point from which to work and had to be adjusted for different conditions in different areas. A&P was told that in-plant wage rates in Chicago were substantially higher than in New York (CX 25C, 26). The average A&P store was taking less than 600 points or 25 cases per delivery (RAPX 233, p. 8). Union work rules and Chicago Health Regulations forbade sidewalk drop delivery and Borden, not A&P, took the risks of delivery (CX 23D-E, 62). Nevertheless, the final Borden offer granting prices to A&P for half-gallons and gallons of milk were .6 to .8 cents per point below Glen & Mohawk's prices (RAPX 137).

99. After the commencement of the private label contract, it was obvious to A&P that its private label milk costs were below its Borden label milk costs for which it got an effective discount of only 30 percent and not the 35 percent to 38 percent effective discount available on the A&P label products (CX 255B; RAPX 66). This was so, although Borden's services to A&P in connection with its Borden label sales were the same as those rendered in connection with Borden's private label sales. Products of both labels were delivered in the same trucks and in the same manner. Products of both labels were pre-ordered. Borden did not accept returns of either product after ex-

piration of the code date and Borden did not provide any in-store or promotional services (CX 75A-B, RAPX 66, Supplement C, pp. 238-239). Thus, as of mid-November 1965, and thereafter, A&P should have known that its average [31] store in the Chicago Unit took less than 600 points per delivery (CX 24B, 27, 20H; RAPX 233, p. 8) but it was purchasing Borden label milk at a price of $.3430 per half-gallon and A&P label milk at a price of $.3124 per half-gallon. In January 1966, Borden offered other customers the same limited service option provided to A&P, provided such other customers took 600 points of milk per delivery. Such other customers, however, had a maximum discount of 30 percent off of Borden's list price. Actually, the discount was 26 percent off Borden's list price plus 1 percent additional for advance ordering and limited service plus 1 percent additional for limitation on returns plus an additional 2 percent for those customers which were centrally billed, for a maximum of 30 percent (CX 123, 138; Gose, Tr. 1110). A&P's private label cost was the equivalent of a discount ranging between 35 percent to 38 percent without regard to the volume taken by any of its stores. Borden's services to all were the same (CX 75A-B, 123, 138). Although Borden's private label contract did not offer salesman's services to handle promotions, its limited service to non-A&P stores also stated that Borden would not provide promotions (CX 123B; Lasorso, Tr. 2699; Barnes, Tr. 3910; Cox, Tr. 3992; Havemeyer, Tr. 9137-9138).

100. It thus is apparent that the only benefit lost by A&P in connection with the private label contract was advertising. But dairy advertising was not a big expense—2 to 3 mills per point or less (CX 54; Soldwedel, Tr. 3387, 3430). Indeed, Bowman told A&P that it could not justify any price difference between private label and advertised label products (Cannon, Tr. 6136).

101. A&P also knew or should have known that its price preference on private label products was increased in May 1966. Then Borden raised its price by $.0035 (at maximum discount) to cover increased costs of labor, containers and social security costs (Gose, Tr. 1047, 1110; CX 79, 123, 124, 125, 138, 139, 140). A&P refused to accept the price increase except on its Borden label purchases and Borden repeated its request in March and April of 1967. At that time A&P accepted only a $.002 increase (CX 81, 102, 103, 105, 106, 110, 255B; Gose, Tr. 1052-1058; Schmidt, Tr. 1723).

K. *The Bowman and Borden Competitive Bids*

102. As noted earlier, A&P had only two bid under consideration in 1965, the Borden bid and the Bowman bid. It compared the two bids on the basis of their prices on the private label products offered by Borden which was the only factor in which it was interested.

[32] 103. The Bowman bid was based upon a 3.5 percent butterfat content of milk. The Borden offer was based upon a 3.4 percent butterfat content. There is nothing in this record to indicate by what amount Borden would have increased its bid to supply milk with a butterfat content of 3.5 percent instead of 3.4 percent. Similarly, there is nothing in this record to indicate how much Bowman would have reduced its price to supply 3.4 percent butterfat milk instead of 3.5 percent butterfat milk. The two bids are not comparable with respect to butterfat content.

104. The Bowman bid, unlike the final Borden bid, included glass gallons of milk, but any comparison between the two bids based upon glass gallons of milk is improper inasmuch as A&P did not want glass gallons under private label and when Borden attempted to include such product,

A&P told Borden to take it out. Glass gallons were therefore not included in Borden's final offer (CX 62, 66; Schmidt, Tr. 1777; Tarr, Tr. 883-884).

105. A&P argues that any comparison of the Bowman and Borden bids should include by-products which were not offered under private label by either Bowman or Borden. This is also improper inasmuch as A&P was not interested in such items (CX 62; RAPX 50).

106. The Bowman bid was actually inoperative. It was based upon a volume that A&P would not and could not provide. It was based upon an estimated total dollar volume of approximately $1 million per month using Chicago list prices. Bowman's letter to A&P stated:

> A substantial increase or decrease in the size of your order (compared to the assumption of dollar volume set forth above) would affect these prices. . . . (CX 50A; Cannon, Tr. 6149).

A&P's actual purchases using list prices totaled about $754,000 per month (CX 13A, 17B, C, 13H). This calculation is arrived at by taking the unit volume for one week, annualizing such figure and multiplying the result by Bowman's list prices for such units. Taking into consideration the fact that these calculations were for the early part of 1965 and that A&P's purchase volume declined later in 1965 and thereafter, it is reasonable to infer that Bowman's bid was subject to upward revision by reason of such substantial decline in volume (CX 75Z; Schmidt, Tr. 1684, 1731, 1737). This is confirmed by Bowman's table of price [33] adjustments showing that its prices would be about 2.7 percent higher if A&P bought from Bowman's for only 70 percent of its stores and 3.1 percent higher if it bought from Bowman for only 50 percent of

its stores (CX 50R; Schmidt, Tr. 1761). The Borden offer was not based upon volume (CX 62).

107. The Bowman bid was also inoperative with respect to deliveries. The Bowman bid was based upon three-day-per-week deliveries in the Gary-Hammond area of Indiana (CX 50L). Actually, it delivered milk six days per week in the Gary-Hammond area and could not reduce the days of service because of its union contract (Kalchbrenner, Tr. 9295; Banaski, Tr. 9534; CX 23D, 27, 31A; RAPX 246A). Although the Route Foreman for Borden testified that the union contracts permitted a 4-day delivery, he stated that the practice was 6-day delivery (Szczepaniak, Tr. 1287-1288). The 1965 contract provided that no change shall be made in days of route operation (CX 299i) and the 1967 contract states: "The present delivery system of 6-day operation shall *continue* in effect" (CX 300k, emphasis supplied). It is clear that 6-day delivery was the union practice and the requirement here.

108. In connection with the Bowman bid, A&P admits that it did not ask for and did not receive a letter or statement from Bowman stating that its prices were legal or proportionately available to others (Schmidt, Tr. 1848-1849).

L. *Cost Justification*

109. Joseph Malone, Borden's cost accountant, made several studies to determine Borden's direct costs of serving A&P with private label products. Reference has heretofore been made to CX 24D made in July 1965, in which Borden's direct cost for half-gallons, gallons and quarts of milk is shown to be higher than the final price per unit in CX 62C. CX 87 was prepared in June 1966 after the commencement of the private label program. It shows that while Borden was making a profit on Borden label sales,

it was losing from $2,200 to $4,870 per week on the A&P private label business. CX 206 analyzes Borden's Chicago area sales for the 12 months of 1965 and the first eight months of 1966 and shows that Borden's *overall* profits in the Chicago metropolitan area fell precipitously in November 1965 and remained at almost a break even point in 1966, but it did [34] not segregate private label sales which represented more than 25 percent of Borden's Chicago area sales from Borden label sales (CX 42D).

110. Considering that the unfavored customers competing with A&P purchased as much as, if not more than, the A&P store purchased from Borden, that the cost of processing A&P's private label products was no less than its cost of processing the equivalent Borden label product (RAPX 232 Attachment II) and that, except for advertising, no differences in service or delivery terms existed between the labels, but that advertising expense was insufficient to relate meaningfully to the difference in prices Borden charged A&P compared to competing retailers, no price discrimination can be justified under the Robinson-Patman Act. There is no difference "in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which such commodities are sold or delivered." Indeed, Malone's calculations demonstrate the necessary resultant difference in net income because of the unjustified price differentials.

A&P's Factual and Legal Contentions

A. *Count I*

111. A&P contends that it made no misrepresentations to Borden during its private label negotiations. It notes the testimony of Borden witnesses to the effect that A&P's Schmidt asked Borden to eliminate glass gallons from its

bid because other bidders did *not* bid on glass gallons (Tarr, Tr. 883-884; Minkler, Tr. 245-246). Although Bowman, the "other bidder" *had* offered a price on glass gallons, A&P contends that there was no misrepresentation to Borden. A&P contends that Schmidt was referring to a comparison he was preparing between the Borden and Bowman bids which was based on the earlier Borden bid and which did not include glass gallons. The testimony of Mr. Schmidt, however, is not persuasive. He admits that "my recollection is hazy . . . I believe I recall that I was at that time reflecting the opinion of the Chicago unit, members on my level of management, that we did not want to carry glass private label milk because of the problems at the store level" (Schmidt, Tr. 1777-1778). On balance, I find the testimony of Tarr and Minkler more persuasive. A&P further contends that the reason for not desiring glass was irrelevant [35] because it would not have resulted in the slightest change in Borden's thinking or calculations. But that is not the point. A&P rejected Borden's bid to meet competition on a ground that was baseless, that is, for the reason that Borden's bid included glass gallons, an item which A&P falsely represented to be excluded from the alleged competitor's (Bowman's) bid.

112. A&P also contends that the bid was not induced or altered by a "sharpen your pencil" comment, arguing that it is doubtful that this comment was made at all and, if it was made, it almost certainly was made at a stage in the negotiations when it did not affect Borden's final quotation. This ignores the credited testimony of Mr. Tarr who said:

> This thing that I say about sharpening the pencil was just toward the very end of the thing. It was after all these things had been talked about and *before* we brought over the final papers. (Emphasis supplied, Tr. 985).

113. A&P further contends that there was no misrepresentation by it even if it conveyed the impression to Borden that Borden's bid merely met Bowman's bid rather than actually beating it. It argues that, even if the Borden bid was lower by some $82,000, the difference was less than 1.5 percent of the total business involved and that therefore comments by A&P like "in the ball park" and "substantially met the other quotes" would appear to be quite accurate. The difference in savings between the Bowman and Borden bids amounted to approximately $145,000. With the adjustment for the increase in raw milk costs, Borden's bid offered A&P a savings of some $820,000 while the Bowman bid's savings amounted to some $737,000. The difference in these two savings amounted to some $82,000 or 11 percent of the Bowman bid savings which is not a *de minimis* amount, particularly in the grocery or dairy business. Even a comparison of the differential in savings to the total business involved, the 1.5 percent referred to by A&P, would not necessarily be *de minimis* in the grocery store industry where net profits of some retailers did not exceed such percentage figures. Here 1.5 percent represented about one-third or more of the unfavored competitors' pre-tax net profits (See Finding 87, *supra*).

[36] 114. Perhaps the most meaningful misrepresentation by A&P was that it had a competitive offer with which it could compare the Borden offer. The Bowman bid, unlike the Borden bid, was conditioned upon a certain minimum dollars' worth of sales to A&P. Moreover, the Bowman bid was based upon its assumption that it could deliver three days a week in the Gary-Hammond area of Indiana, but this was incorrect. Bowman delivered milk to stores in this area six days per week and could not reduce its days of service because of the union practice

and requirement that milk be delivered six days per week to stores (See Finding 107, *supra*). It follows, therefore, that A&P actually did not have a competitive bid from Bowman to compare to the Borden bid. Although A&P attempts to minimize these differences and to explain them away, the fact remains that Borden was asked to meet an unrelated bid which was therefore not competitive. A&P's calculations to arrive at a price Bowman would have bid if conditions were identical are conjectural and not factual. They cannot be accepted.

115. There can be no doubt that when A&P accepted Borden's offer it understood that Borden had granted a substantially lower price than that offered by Bowman, the only other competitive bidder if, indeed, there was an offer which could be compared with Borden's (See Finding 55, *supra*). When it told Borden that its offer was being accepted after Borden had told A&P that it was submitted only to meet competition, it misrepresented the situation to Borden.

116. A&P argues that complaint counsel seek to enact "a rule requiring all buyers to tell all sellers who indicate that they are bidding against competitors what the competitors' price is", citing *Beatrice Foods Co.* v. *Kroger Co., Inc.*, 76 FTC 719, *aff'd* 438 F.2d 1372, *cert. denied* 404 U.S. 871 (1971), as well as *Forster Manufacturing Co.* v. *FTC*, 335 F.2d 47 (1964). This is just not so. As the court held in *Beatrice*:

> The controlling point here is not the 'hard bargaining' nor the price levels but the *misrepresentation* of the Broughton bid, in order to induce a discriminatory price (438 F.2d at 1378; emphasis in original).

[37] Here, A&P misrepresented the situation to Borden. It knew or should have known that there was no opera-

tive bid from Bowman. Nevertheless, it told Borden that it had such a bid and when Borden made it quite clear that it was submitting its bid to meet the competitive offer A&P made no effort to disabuse Borden of that belief, although it understood that Borden had beat that bid. There was no obligation upon A&P to divulge the name of the competitor or the actual price offered by a competitor. It was sufficient if it had informed Borden that the meeting competition defense was not available. In failing to do so it misrepresented the situation to Borden and it was this misrepresentation that was a violation of Section 5 of the Federal Trade Commission Act. As the Commission concluded in the Health Hazards Statement (29 Fed. Reg. 8354-8355 (1964)):

> In the last analysis, the Commission's responsibility in this area is to enforce a sense of basic fairness in business conduct.

A&P failed to meet that standard. As the Health Hazards Statement further points out:

> No enumeration of examples can define the outer limits of the Commission's authority to proscribe unfair acts or practices, but the example should help to indicate the breadth and flexibility of the concept of unfair acts or practices and to suggest the factors that determine whether a particular act or practice should be forbidden on this ground. These factors are as follows: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether is causes sub-

> stantial injury to consumers (or competitors or other businessmen). If *all* three factors are present, the challenged conduct will *surely* violate Section 5 even if there is no specific precedent for proscribing it. The wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is [38] exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or other.

A&P's misrepresentation was within an established concept of unfairness (see *Beatrice, supra*); it was unethical and it did cause substantial injury to Borden as well as to AP's competitors (See Findings 59, 62-88, *supra*).

117. A&P contends that its conduct caused no injury to Borden or to Borden's employees arguing that Borden's merger of its Chicago Central district with the Midwest District in Columbus, Ohio, was a normal part of Borden's operations in order to improve efficiency levels. This disregards the testimony of Mr. Minkler (Tr. 279-280) which attributed the reorganization to the loss of Borden's income occasioned by the private label contract. That the reorganization had other justification referred to by A&P to improve efficiency does not necessarily invalidate the fact that I have found *supra* (Finding 59), that at least in part the reorganization was prompted by the reduction in income caused by the private label contract. Nor does Borden's 1966 annual report making no reference to the loss of income from the private label contract necessarily invalidate such a finding inasmuch as a company might not regard an annual report to be the most auspicious place to speak of income losses due to a private label contract.

B. *Count II*

Count II of the complaint charges A&P with knowingly inducing or receiving price discriminations in violation of subsection (f) of Section 2 of the Clayton Act, as amended.

I. *The Discrimination*

118. A&P attacks the calculations made by complaint counsel for the prices paid by non-A&P store customers to Borden for products purchased by A&P under its private label program, arguing that complaint counsel has failed to properly authenticate the underlying Borden rebate information relied upon. It states that the rebate checks relied upon by complaint counsel were incomplete, citing three instances. In Burger's Supermarkets, A&P notes that a second check from Borden was never included in complaint counsel's calculations. The amount of this second check was $207.63. Even were it to be included, [39] it would scarcely diminish the discrimination suffered by Burger's Supermarket which experienced thousands of dollars in higher costs incurred. A similar inconsequential discrepancy is mentioned in connection with Model Food Center where the rebate check does not tally exactly with the method of calculation. This rebate check amounted to $79.36 and should have amounted perhaps to $8.00 more. A&P also objects to complaint counsel's failure to include certain payments by Borden to Wilco and Tittle. These appear to be checks for interest payments with no relation to the volume of purchases by these companies and would have insignificant impact upon the price discrimination calculations.

119. In addition, A&P contends that the documents relied upon by complaint counsel were incomplete. But the subpoena for this information to Borden required all documentation necessary to show the net price to customers

and it appears that such was provided. Moreover, the rebate checks used by the Commission's accountant tallied almost exactly with Borden's worksheets. Under these circumstances it appears that the data used by complaint counsel were authenticated sufficiently.

120. A&P also attacks complaint counsel's calculations for non-A&P customers in Illinois, arguing that discounts greater than those shown on Borden's discount schedule were offered on a customer-by-customer basis. Although complaint counsel's accountant was not able to reconcile the price book amounts with the price lists in some of his spotchecks, it was apparently due to such things as the illegibility of entries and the inclusion of butter which was not on the price list and did not necessarily indicate that these customers were not charged these prices (Bitting, Tr. 4882). Moreover, such additional discounts were apparently given on small volume by-product items and would not substantially alter the overall pricing pattern (CX 288 D,R,S; Bitting, Tr. 4225-4231, 4234-4236; Soldwedel, Tr. 3421).

II. *The Representativeness of the Stores*

121. A&P further contends that while complaint counsel may have shown that A&P's discriminatory price caused injury to those Borden customers discussed by complaint counsel, this showing is not sufficient because these stores were not "representative" of all purchasers from Borden. It is doubtful that complaint counsel has such a burden.

[40] In *Beatrice, supra*, the Commission said:

> The Robinson-Patman Act requires consideration of secondary line injury on a location-by-location basis. Each local competitive area, each Kroger store loca-

> tion, becomes the competitive environment within which the potential effect on competition with Kroger must be examined. (76 FTC at 805)

The Commission noted that in *Foremost Dairies, Inc.* v. *Federal Trade Commission,* 348 F.2d 674 (5th Cir. 1965), *cert. denied,* 382 U.S. 959 (1965), the only competitive environment examined was the city of Albuquerque, New Mexico, in which were located some eight stores in a small chain which received favored prices. Only one of these stores was located in proximity with an unfavored Foremost customer. Here, local competitive areas were examined. In the Gary-Hammond area of Indiana, A&P's five largest independent grocery competitors paid substantially more than the A&P stores in that area during the six month period from October 1966 through March 1967 and the later ten month period from June 1969 through March 1970. Similarly, the Tittle store in Valparaiso paid substantially more than its competitor A&P store. On the O'Hare route Borden's cash store customers purchasing $800 or more of milk per month paid substantially more than A&P for fluid milk products sold under private label (See Findings 62 through 77 *supra;* also CX 183). These price discriminations have been found to be meaningful and productive of injury to such non-favored competitors of A&P. In a secondary line competition case, the Supreme Court has said that it is

> self-evident . . . there is "a reasonable possibility", that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers (*Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37 (1948).

As the Commission stated:

> It seemed self-evident that where a producer is selling a homogeneous product, such as salt, automotive parts, or gasoline, where competition is extremely keen among retailers, and where margins of profit or markups are small, a lower [41] price to one or some of the competing retailers not only 'may' but must have the effect of substantially lessening competition (*Sun Oil Co.*, 55 FTC 955, 962 (1959).

Although the Seventh Circuit seemed to inject a necessity to make "realistic appraisals of competitive impact" in its decision in *American Oil Co.* v. *Federal Trade Commission*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964) even that court assumed competitive injury upon a showing of different prices charged competing customers where the differential was "substantial and sustained" (*Bargain Car Wash, Inc.* v. *Standard Oil Co.*, (Ind.), 466 F.2d 1163, 1174 (1972)). Assuming nevertheless, that the representativeness of the non-favored stores selected by complaint counsel here must be shown, I find that burden to have been met. The discriminations and injuries shown here involved local competitive areas of Gary-Hammond, Indiana, where A&P's five largest independent grocery competitors' costs were compared with the A&P stores' costs in the same area. In the Valparaiso, Indiana, area the Tittle store was compared with its competitor A&P store. In the Chicago and suburbs area Borden cash store customers were compared with A&P stores. In the Indiana area the purchases of the unfavored competitors represented more than two-thirds of all of Borden's non-A&P store wholesale sales in the area (RAPX 234, p. 19; CX 182). In the Chicago and suburbs area, the unfavored competitors chosen represented more than 40 percent of Borden's total sales on its O'Hare wholesale

routes, which in turn represented a major part of Borden's total sales in the Chicago area (Compare RAPX 233, p. 69 Col. (1), with p. 8, 1, 6, Cols. 7, 13; RAPX 76; Bitting, Tr. 4788-4789, 4815-4816; CX 211D; Gose, Tr. 1072).

122. A&P contends that the cost comparisons are defective because they do not compare all of the allegedly injured competitors' dairy purchases from Borden against all of A&P's purchases but only against A&P's private label purchases. In the *Beatrice* case, respondent Kroger raised the same argument. There, however, Kroger, in addition to its private label purchases, was an unfavored purchaser of Beatrice labeled products and argued that its purchases of both lines should be considered in assessing injury. (The situation here is even stronger in that there is no claim that A&P was an unfavored customer in its purchases of Borden label products.) The Commission held:

> We think the proper inquiry is whether Kroger by obtaining cheap milk under its own label was given a competitive advantage which it used to potential injury of its competitors (at 806).

[42] The Commission went on to hold that only the Kroger purchases of private label products were the correct measure of competitive injury and discrimination since Kroger's purpose in purchasing private label products was to obtain an overall advantage over its competitors since it used the private label milk "for the benefit of its entire grocery business and not merely to sell against name brand milk in the stores of its competitors." In that case Kroger, as did A&P, purchased private label milk at a cheaper price but sold it at the higher price of brand label milk, thereby reaping higher profits. It did not pass any of its cost savings on to the consumer. Moreover, Kroger con-

tinued throughout the period of discrimination to purchase the various items under both private label and brand label. A&P, however, carried the products in question under both labels for only a short introductory period. From October 1966 on, it purchased little or no Borden label milk products, so that it enjoyed a preferential price on all its milk purchases. Thus, except for a few months, whether or not A&P's Borden label purchases were aggregated with its A&P label purchases would make little difference in the calculation of A&P dollar advantage over its competitors.

123. A&P also contends that complaint counsel's proof of injury was insufficient, arguing that Borden's discrimination in favor of A&P lasted only briefly. This ignores the evidence of record that the discrimination lasted for years. A&P also cites evidence to the effect that the unfavored competitors could purchase milk at prices below those charged by Borden. There is no evidence, however, that such competitors were offered prices which even came close to A&P's substantial discount at the times in question (Gintert, Tr. 2492-2496; Minard, Tr. 3256-3258; Kristoff, Tr. 2329).

III. *Knowledge*

124. A&P also argues the issue of knowledge. I have already found that Borden's Minkler told A&P that the Borden bid was to meet a competitive bid only and that A&P's Schmidt said that he understood (Findings Nos. 51, 52, 53, *supra*). Moreover, I have found that A&P's officials understood that Borden's bid was "substantially better" than the Bowman offer (Finding No. 54, *supra*). Nor did A&P have any reason to distrust the representations of Borden since it admittedly had a high regard for Borden's cost accounting and legal [43] departments (Finding 22, *supra*). A&P's Schmidt admitted that he considered Tarr, Minkler and Malone of Borden "honest and

forthright" (Schmidt, Tr. 1843). A&P's argument also ignores the fact that it knew Borden's cost savings were made without spreading it to individual products and that when it did make such a spread, it changed the products covered and the prices without changing the savings which could hardly be the result of cost differences attributable to differing methods of sale or different quantities sold. Moreover, A&P realized that Borden removed the statement "these prices are available to all on a proportionally equal basis" from its private label price change tables. Since it was A&P's policy to require such statements A&P should have known or surely been put on notice that Borden's new private label prices were not available to others.

125. A&P also attacks the reliability of Borden's cost studies arguing that they do not reflect savings Borden could expect from the introduction of the private label program. It attacks the Malone studies which show Borden's direct costs to be higher than the final price agreed upon to A&P, arguing that certain inconsistencies and irregularities make these studies unreliable. This position, however, is difficult to reconcile with the testimony of A&P's witnesses who considered Mr. Malone to be expert, forthright and honest. If so, A&P then must have known at that time that the price it had wrested from Borden was below Malone's calculations of cost.

126. A&P relies on Smith's testimony that he was assured by Borden's Archer that Borden's letter was a letter of availability and even more, which testimony I have not credited, preferring to believe Borden's Archer who denied such conversation. A&P contends that Archer must have seen Borden's letter and lied when he said he didn't see it, because, as A&P contends, Archer had all the other materials sent to New York on the negotiations. The evi-

dence shows, however, that Minkler forwarded two sets of Borden's final proposal to Mr. Pentz in New York (CX 64A). Minkler forwarded one copy of the legal letter to Pentz but this transmittal contains a penciled note which does not indicate that Archer was sent a copy of that document (RAPZ 3). Moreover, since Archer had been promoted Executive Vice President of Borden earlier and would not have been as deeply involved in the affairs of the milk division as previously, it is not likely that he would have reviewed the legal letter from Borden. A&P also notes that in 1967 with reference to another bid [44] by Borden it asked Borden what was meant by language similar to that on Borden's legal letter here. On that occasion Borden replied that it meant the price would be available to others. No explanation is offered, however, why similar inquiry was not made by A&P at this time. The fact that Borden gave it such a meaning at another time, later, cannot relate back to an earlier period of time without supporting evidence.

127. A&P disputes that its trade experience would have led it to believe that Borden's final prices could not have been cost justified. I have found, however, that A&P was quite knowledgeable about the dairy industry (See Findings Nos. 97, 98, *supra*). A&P argues also that Borden expected reduced costs as a result of its new Woodstock plant. But we are here concerned with differences in the costs, not expectations which may or may not be realized. Nor is it relevant that A&P could get better prices on private label in other parts of the country. We are here not concerned with other parts of the country. Nor is A&P's reliance upon the costing guidelines of the 2-2-2 formula appropriate where, as I have found, this formula was a mere reference point and was subject to adjustments for local differences which would make it inapplicable to the Chicago area.

IV. *Meeting Competition*

128. As respects the issue of meeting competition A&P argues that although its officials thought the Borden bid was "substantially better" than the Bowman bid in 1965 its review in 1973 shows that in fact the Bowman bid was better. I have found, however, that the Bowman bid was not comparable to the Borden bid. Unlike the Borden bid it was based upon a certain anticipated volume of sales with a higher cost if the volume declined, which it did. It was also based upon a certain delivery schedule which was impossible of performance due to union practice and requirements. Although A&P attempts to develop the change in the Bowman bid with a corrected delivery schedule, the correction is A&P's estimate and not Bowman's. A&P also adjusts both the Bowman and Borden bids to reflect the same butterfat content of the milk, inasmuch as the Bowman bid allegedly specified a 3.5 percent butterfat content compared to the Borden milk which was 3.4 percent butterfat. Again, this is a correction by A&P and not by either Borden or Bowman. But it doesn't appear that A&P was interested particularly in the butterfat content as long as it met the legal minimum requirements (Schmidt, Tr. 1727-1729). [45] A&P uses Borden calculations to raise Borden's price for 3.5 percent butterfat milk using Borden's adjustment of its raw milk cost. This does not necessarily mean that Borden's price would be similarly adjusted *by Borden* had A&P asked for a different butterfat level. In addition, since the Borden butterfat level was about 3.45 percent anyway (Walker, Tr. 5513) and Borden was desperate to keep the A&P business, Borden would not necessarily make any adjustment in its prices to raise the butterfat content to 3.5 percent (CX 62X; Havenfeyer, Tr. 6779; RAPF 130, p. 134).

129. Above and beyond the foregoing obstacles to an adjustment of the Borden bid to conform to what was felt

to be the Bowman bid, that is, 3.5 percent butterfat content, there appears to be serious doubt that the Bowman bid actually called for 3.5 percent butterfat content. Such was not the impression of the negotiating individuals in 1965 but was only the result of second thoughts generated by a review of the bids at the request of A&P counsel in 1973. The testimony of the witnesses, however, indicates that the Bowman bid was based upon a 3.5 percent butterfat content of the class I raw milk and not the butterfat content of the processed milk (Smith, Tr. 1415-1417, 1445-1450; Schmidt, Tr. 1815; Bartels, Tr. 1897). Indeed, a Bowman official, Mr. Cannon, testified that the Bowman offer did not contain any specifications compelling Bowman to supply at any particular butterfat level (Cannon, Tr. 6187-6188). This was confirmed by the Commission's expert dairy economist (Walker, Tr. 5450-5453). In fact, this expert found that Bowman's butterfat level in 1965 was actually lower than Borden's butterfat level judging from the handler's reports which he examined (Walker, Tr. 5461).

V. *Cost Justification*

a. Attacks upon Malone's calculations

130. With respect to cost justification, A&P first attacks the computations by Malone as erroneous and unreliable. Specifically, CX 54 purporting to show Borden's cost to permit Borden to make an additional savings proposal to A&P is attacked because Malone allocated the costs on a point basis rather than on the individual packages involved. But higher priced and lesser volume by-products are more costly to handle so that a cost computation by the number of units could not clearly reflect actual cost whereas a cost computation by points in which these higher priced and lower volume by-products are given higher point values would be more nearly accurate (See

CX 7A). Moreover, since [46] Malone was seeking to ascertain the direct costs of A&P's business it was sufficient for his purposes apparently to ascertain overall costs and relate them to the A&P volume. That Malone was familiar with costs can hardly be disputed and Malone did consider A&P's volume of business (Malone, DTR pp. 148-151). A&P also attacks CX 54 because the costs therein are higher than CX 4, a Borden calculation of costs pertaining to Borden's operations in Wisconsin in August 1964. But CX 54 relates to Chicago and to 1965. A cost study which is neither contemporary nor based on the same market areas is hardly relevant and cannot be the basis for discrediting CX 54 which was prepared for the correct time period and locality, particularly when it appears that the highest labor rates are in Chicago as against all other dairy rates in the United States (Schaub, Tr. 3305) and where costs are increasing during 1964-1965 (See Resp. A&P's Proposed Findings, pp. 380-381).

131. CX 54 is supported by CX 87, another calculation prepared by Malone some 10 months after CX 54. In CX 87, Malone calculated costs experienced selling to A&P by two different accounting methods and in each case found that Borden was selling private label to A&P at a loss. Although A&P argues that CX 87 does not relate specifically to Borden's cost of serving A&P, citing Malone DTR p. 240, it appears that Malone was speaking of another exhibit, CX 13, at that point. With respect to CX 87, Malone testified:

> The three documents representing 87A, B and C were developed in an attempt to reconcile our position as to which would be the best course to follow. Number one, we had the experience with the A&P private label operation and we wanted to see on a general basis, on a general application of the elements of cost, what

> our position would be, either lose or gain, and relate to where we would be if we lose all of the business. (Malone DTR 184-185).

132. A&P also argues that CX 87 be disregarded because "the data used to determine the Borden costs shown on that exhibit were unavailable to A&P at the time of trial." This objection is now being raised for the first time in connection with CX 87. A&P's motion to strike CX 87 on November 30, 1973, objected to the admissibility of that document on the ground that it was neither past recollection recorded nor a business record. These objections were overruled (see my Order of March 5, 1974). It ill becomes A&P to show concern for the [47] absence of underlying data to CX 87 literally years after such objection would have been timely and appropriate, that is, when Malone gave his deposition (Malone DTR pp. 229-250), or at least on November 30, 1973, when it moved to strike CX 87.

133. A&P also disputes CX 87 in that it compares the prices of the products sold to A&P on the O'Hare branch. Inasmuch as the O'Hare branch is the highest price area covered by the Borden A&P contract (CX 62) whereas Malone used an average price for all A&P stores including stores with lower prices than those from the O'Hare branch it necessarily follows that the average price arrived at for all will be lower than that at the O'Hare branch.

b. Burden of Proof

134. A&P contends that complaint counsel have not proven that the price discriminations were not actually cost justified and that they have not carried the burden of proof required under Section 2(f) of the amended Clayton Act, citing *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61 (1953). Complaint counsel must come forward with evidence which proves both that the prices paid by the

respondent buyer were not in fact cost justified and that the buyer knew or should have known this fact. Where, however, the buyer knows he is receiving a substantially lower price although the quantities in which he buys and the manner and amount of exertion with which he is served by a seller is the same as for his competitors

> . . . the Commission need only show, to establish its *prima facie* case, that the buyer knew that the methods by which he was served and the quantities in which he purchased were the same as in the case of his competitors (346 U.S. at 80).

Even under *Canteen*, complaint counsel have met their burden here. The competitors were charged a higher price for Borden's milk products despite the fact that they took at least as much and often more than the individual A&P store with which they were competing. Further, although their service requirements were in some cases greater than that required for A&P they could have had the identical services but still at a higher cost than A&P was paying. Thus, with all differences in quantity and service eliminated there were no cost differences with the possible exception of advertising which I have found to be negligible in this particular situation.

[48] 135. Nor can it be denied that A&P knew or should have known that the methods of service and the quantities it purchased were the same as its competitors. A&P, not a novice in the dairy retailing business, certainly knew that Borden's prices were set according to its price lists and discount schedules. Moreover, it appears that A&P was purchasing Borden label products at the same prices that were charged its competitors. A&P officials and Borden officials discussed pricing patterns in the Chicago area as compared to pricing in other cities and even if A&P did

not see Borden price lists it certainly knew the general contents and could have solicited further information (Tarr, Tr. 857-859; CX 12B, 19). Under these circumstances and in view of A&P's other knowledge of Borden's prices and costs A&P clearly had the duty to inquire to determine whether its prices were legal. In *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F.2d 351, 365-366 (9th Cir. 1966), it was held that "Meyer had a knowledge of at least sufficient facts to create a reasonable suspicion that the payments it received were probably illegal . . . the duty to inquire [thus] arises."

The Commission has held

> Where a buyer knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer the Commission need only show to establish its *prima facie* case that the buyer knew that the methods by which he was served and the quantities in which he purchased were the same as in the case of his competitor . . . However, assuming the matter to involve different methods or quantities if complaint counsel show such facts and circumstances as would have given the buyer reason to believe based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded to him, they would have met their initial burden (*Suburban Propane Gas, Corp.*, 71 FTC 1695, 1698-1699, n. 2 (1967)).

[49] A comparison with the *Beatrice case* is also appropriate. In that case complaint counsel were held to have met their burden of proof, relying upon Kroger's market knowledge, the fact that it did not seek evidence of cost

justification from the various bidders, and the fact that Beatrice's pricing to Kroger was on a cost-plus basis, whereas Beatrice was selling to competitors on a list-price-minus-discount basis which was not based on actual costs (*supra* at pp. 820, 821). In that case there was no communication between the parties concerning cost justification. Here, however, Borden submitted detailed cost data and informed A&P that its bid could only be justified on a meeting of competition. By any approach, therefore, complaint counsel have met their burden of proof to demonstrate that Borden's price to A&P was not cost justified and that A&P knew or certainly should have known that such was the case.

c. Havemeyer's Cost Studies

136. In rebuttal to the contemporaneous Malone Studies (CX 54B, CX 87A-B) and other cost data (CX 21U, CX 23-25A, CX 206), A&P submitted three basic cost calculations, RAPX 232, 233 and 234. RAPX 232 purports to demonstrate that Borden could have expected to earn a profit on its private label price proposal to A&P. This exhibit purports to calculate the total cost of processing, transportation to branches and delivery to the store, of A&P private label items based on costs of Borden for May 1965 or for other periods in determining some of these costs. It compares such cost to the private label price granted to A&P in September of 1965 to arrive at a calculated weighted margin per point for Borden in its sales of private label dairy products to A&P. It breaks down the total cost into seven categories: direct material costs; processing costs; trailer loading; hauling to branches; truck loading at branches; delivery; and indirect marketing general and administrative costs. RAPX 233 compares Borden's cost of serving A&P stores with that of 28 competitors on Borden's O'Hare routes in March 1966. RAPX 234

compares Borden's cost of serving A&P stores with that of five competing purchasers in 8 store locations in Hammond and Valparaiso, Indiana, in October 1969.

137. These studies were prepared by Mr. Robert G. Havemeyer (Havemeyer), called as a witness by respondent A&P. Havemeyer is a management consultant and a partner in the management [50] consulting firm of Case & Co., and has been with that company and its predecessor firm, Stephenson, Jordan & Harrison, since 1953. His professional career has been very largely devoted to cost accounting in the dairy industry (Havemeyer, Tr. 6770-6775). He did not, however, base his studies upon any personal observations of Borden's operations and based his study upon only a portion of Borden's records which portion had been selected by someone else (Daube, Tr. 6704-6705). He did not partake in the process of selection or even review all of the available documentation to determine the completeness and representativeness of the selection (Tr. 7520). His experience included only one other Robinson-Patman cost justification study presented in a litigated case (*U.S.* v. *Borden* (Bowman), 370 U.S. 471 (1962)). (Tr. 6769-6775, 9131-9132).

i. Delivery Costs

138. Of critical importance is his calculation of delivery costs, being the most important and largest expense item with the exception of direct material costs. Havemeyer originally calculated them using Case & Company's wholesale milk delivery time standards. Complaint counsel objected to the admission in evidence of such time standards on various grounds. By order dated September 11, 1974, I overruled complaint counsel's objections insofar as they were based upon alleged unreliability, immateriality or irrelevance. However, by order of September 16, 1974, I

sustained complaint counsel's objections to Havemeyer's studies insofar as they were based upon Case & Company's time standards because data underlying the conclusions reached on these studies were not produced (RAPX 232, pp. 89, 76; RAPX 233, pp. 39-66; RAPX 234, pp. 3-10). Consequently, the ultimate conclusions of Havemeyer for the cost of this function have been excluded and no meaningful comparison is possible between his studies and the cost calculations prepared by Malone. (See my Order dated November 20, 1974).

139. A&P nevertheless contends "there is ample evidence in the record to calculate the costs that the Borden Company could have anticipated if A&P accepted the significantly reduced delivery service which was an explicit condition of the private label price proposal". It argues that delivery costs can be calculated using the official Wisconsin Manual. It contends that Wisconsin is within the same region of the Borden Company as the Chicago metropolitan area and that operating conditions within the region will be roughly comparable.

[51] 140. The so-called Wisconsin Studies are RAPX 9. Dr. Solverson testified on behalf of complaint counsel in June 1973. The thrust of his testimony was to the effect that a differential in delivery times per unit for different types of delivery services narrowed as quantities per delivery increased. In cross-examination, counsel for A&P offered several exhibits purporting to contradict Dr. Solverson's testimony and these were received in evidence (RAPX 8 through 15). As I noted in my order dated November 22, 1974, these were received in evidence for impeachment purposes.

141. A&P argues that Dr. Solverson testified that the time requirements for effecting full and limited service

deliveries in Chicago would be the same as full service in Milwaukee (Solverson, Tr. 1556). I do not so read his tetimony. Rather, it appears that Dr. Solverson was speaking of a pattern or relationship between modified drop and full service in delivery time savings and that it was this pattern of decreasing delivery time savings when volume goes up that is true for a large number of geographical areas. He did not testify that time standards from the Wisconsin Manual or his thesis were applicable anywhere else. Indeed, the Wisconsin Manual and Dr. Solverson's thesis were admitted to show disparities between the two. Moreover, his thesis contained time observations from one additional company not included in the Manual figures (Solverson, Tr. 1601-1602, 1604-1605). There were also differences in the definitions of the various service terms as between this company and those developed in the Wisconsin Manual (Solverson, Tr. 1606). Thus, RAPX 9 shows that one of the functions performed under full service in Wisconsin was stamping merchandise, a service that was not part of full service in Chicago (Pergler, Tr. 5651-5654; RAPX 9, p. 2; RAPX 35).

142. It is, therefore, inappropriate to attempt to establish time standards from RAPX 9. It fails to be precisely applicable to the State of Wisconsin, let alone the Borden experience in the Chicago market area. Even Havemeyer admitted that there were very substantial differences in both the fixed time per stop and the variable time per case as between his New Jersey Study and his Bowman Dairy Study (Havemeyer, Tr. 8183-8187). Thus, even considering RAPX 8 through 15 as not merely admitted for impeachment purposes, they constitute insufficient basis for a determination of Borden's cost in the Chicago area for the periods of time involved in this proceeding.

[52] 143. Nor does it appear appropriate to consider a cost justification defense on the basis of standardized costs. We are involved in actual costs, not what the costs should have been. As Havemeyer reported to the Virginia Milk Commission on a study conducted in that state:

> The cost of the three principal functions—plant processing, distribution and in-store handling—are independent. That is, a low cost processor could be either a low or high cost distributor; so, also, could a high cost processor. The costs of each of these functions are independent of those incurred by the customers (stores) to which merchandise is delivered. (RAPX 245A, p. II-4).

Following this rationale, it is obvious that a particular dairy such as Borden may be a low cost processor but a high cost distributor or vice versa. Standards would arrive at an average or a mean and would not necessarily be descriptive of any particular dairy without some evidence to associate the activities of such a dairy with the average dairy, which evidence is lacking here.

144. Even if Havemeyer's computations re service-times were acceptable, his calculations re delivery costs appear to be unreliable for other reasons. Some of the activities were improperly computed on a time basis. Thus, Havemeyer allocated driver commissions on a time basis rather than to the volume the driver delivers. But commissions were earned and paid on the basis of volume delivered (Pergler, Tr. 5731-5732; Banaski, Tr. 9560; CX 119J-K; CX 298H-J; CX 299H-K; CX 300H-J). Pergler testified:

> The commission that the routemen received was based on their sales not on the time that they put in at an individual store on an entire route.

Banaski testified that wholesale drivers were paid both a salary *and* a commission. The union contracts specified that the salary is determined on a hourly, daily or weekly basis but that the commission is based on the number of points delivered. Havemeyer's calculations result in a higher cost for such activity performed for non-A&P customers and inasmuch as this is apparently incorrect, Borden's cost saving on this function in connection with private label sales [53] to A&P is improper (Lemberg, Tr. 9405, 9408). Similarly, Havemeyer allocated total building expense to the wholesale delivery function and on the basis of the time spent at the store by the deliveryman. In the first place, since all four sales categories were involved—wholesale, bulk wholesale, vendor and retail—only a part of the total building expense should have been allocated to wholesale. Moreover, such expense has no apparent relationship to the time spent at the store by the deliveryman but to the function involved such as loading, storage, etc. (Lemberg, Tr. 9409-9412). Again, Havemeyer allocated the automotive expense of the delivery trucks according to the time spent serving this store by the deliveryman. The proper approach would be to allocate such costs to the products carried since the trucks are used merely to transport the products to the stores (Lemberg, Tr. 9408-9409, 9447, 9451).

ii. Processing Costs

145. But even independent of delivery costs, Havemeyer's calculations are not persuasive. Arguing that Malone's costs as shown on CX 54B are unreliable, Havemeyer calculated Woodstock processing costs by multiplying the unit cost experienced by Borden at its two Wisconsin dairies (the so-called Milwaukee operation) by the units produced at Woodstock, arriving at the total expense that Woodstock would have incurred in producing each product had it experienced Milwaukee unit costs

(RAPX 232, pp. 10-12, 21). He then adjusted the costs to reflect the fact that Woodstock's labor costs were higher than Wisconsin's while its non-labor costs were lower (Havemeyer, Tr. 6990, 6998-6999). This approach does not, however, appear to be reliable. We are not here concerned with the processing costs in Wisconsin but in Borden's Woodstock, Illinois plant. Moreover, we are concerned with the period of May 1965 rather than August 1964, the month used by Havemeyer. There is no record substantiation for the propriety of comparing the two. Havemeyer was not shown to be familiar with either of the Wisconsin plants at the time in question and, in fact, was not familiar with the operations of the Woodstock plant. One of the two Wisconsin plants used by Havemeyer was inadequately identified although the calculations of that unidentified plant appeared to be in some respects [54] referrable to Woodstock. There was no evidential showing that the Woodstock and the Wisconsin plants had similar product lines, similar labor forces, similar equipment, similar utilization of that equipment, similar management problems, similar volume ratios among the product lines, similar filling machines, similar efficiencies, etc. (Tr. 8100-8111). Moreover, Malone was one of the Borden officals who submitted this study upon which Havemeyer relies. Malone stated, however, that "there is no relationship between the Chicago factors and the Wisconsin factors" (Malone DTR p. 36).

iii. Havemeyer's Unfamiliarity

146. Havemeyer's lack of familiarity with Borden's activities also diminishes the value of his calculations concerning rental costs of the Ex-Cell-O machine, which is a filling machine. The allocation of this cost was originally made in accordance with a formula which, however, was

rejected for failure to submit substantiating evidence (Tr. 7397, 7402, 7393). Havemeyer then submitted an alternate method of allocating these costs (RAPX 154; Tr. 8114-9118). He testified, however, that his original method was superior (Tr. 8117) because the alternative was "of an averaging nature". Moreover, since the rental consists of 2 parts—a base rental and a production rental—(Tr. 8131-8132, 8133) and the base rental was paid on a monthly basis but the production rental may have been on a quarterly basis or some other basis other than monthly, we cannot be sure that all machine rental costs are shown in Havemeyer's calculations. His lack of familiarity with Borden's operations makes it impossible for him to supply such information. Malone's informed allocation of this cost in CX 54B and RAPX 65 must be considered superior to Havemeyer's averaging method.

147. There were a number of other areas in which Havemeyer's calculations of cost would not be as reliable as Malone's calculations when one takes into consideration Havemeyer's lack of familiarity with Borden's operations compared to Malone's intimate knowledge of such operations. Thus, in connection with trailer loading expense, Havemeyer discredits Malone's computation where Malone allocated the same expense to gallon glass containers as he allocated to paper gallons (Tr. 8160-8161). Although there were more paper gallons in a case than there were glass, there were also more cases of glass gallons on a pallet (Pergler, Tr. 5632) and there may have been other economies involved [55] in loading the glass gallon pallets of which Malone was aware but of which Havemeyer could not have been aware.

148. A similar difficulty arises in connection with truck loading expense. There Havemeyer attempted to make a determination of the average points of each product that

would be contained in a loaded case relying on his experience of normal practice in the dairy industry (Havemeyer, Tr. 7010-7011). Since, however, he was not familiar with Borden's practices, his computations are not necessarily indicative of Borden's experiences without a determination that such experiences were the normal in the dairy industry. In addition, Havemeyer calculated such costs in contradictory ways. In connection with loading costs in the Chicago area, he included total purchases by the unfavored competitors (the 11 items involved in the A&P private label agreement with Borden and all other Borden dairy products purchased by such stores). In the Indiana study, he considered only the private label items and private label equivalents (RAPX 233, 234). In the latter study, the loading costs were virtually identical. Since this matter involves discrimination on private label items only, the latter study was the only proper approach and would eliminate much, if not all, of the cost differential in this function.

149. Havemeyer's expertise is insufficient to remedy other apparent irregularities of his calculations. Havemeyer attempted to calculate product waste cost but in contradictory ways. He admitted that leakers and product spoiling within date would be product waste (Tr. 7749). He added, however, that this would be a very small part of the product waste which included a privilege to return out-of-date merchandise that was not defective. Consequently, in his profitability study (RAPX 232) he allocated 5 percent of "other delivery costs" to A&P private label (Tr. 7753). In his studies of O'Hare costs (RAPX 233) and Hammond (RAPX 234) Havemeyer took the position that leakers and product spoiling within date are not product waste but were accounted for in some other manner in Borden's bookkeeping system (Tr. 8490). He was unable, however, to cite any record evidence for that state-

ment or from whom that information was obtained. Moreover, there is serious doubt that leakers and product spoiling within date would be only a small portion of the route returns. Competing retail grocers generally testified that they had very few returns (Minard, Tr. 3258; Kristoff, Tr. 2431; Barney, Tr. 3838; Cox, Tr. 4002-4003). Minard [56] testified that what returns his company did have were usually leakers or product spoiling within date. Havemeyer himself indicated that Borden probably experienced a high number of gallon leakers in this period due to the fact that the paper packaging equipment frequently had problems during this period (Tr. 8101).

iv. Indiana Irregularities

150. Another apparent irregularity in Havemeyer's calculations concerns Valparaiso sales where he used RAPX 81 and 87 as the source for cost data on the assumption that Mr. Marquardt, (the independent distributor who delivered in Valparaiso for Borden) picked up his milk at the Hammond dock. He was unable to substantiate his position by documentation (Tr. 8641). Marquardt himself never testified as to where he picked up his milk (Marquardt, Tr. 1315-1331). Record evidence associates Valparaiso more closely to South Bend than to Hammond (CX 17K; CX 62I). There is, therefore, insufficient justification for the use of RAPX 81 and 87. But even if there were, the expenses thereon are Borden's expenses dealing with vendors, not with stores served by vendors who sold on their own terms (Marquardt, Tr. 1323).

151. A&P argues that Havemeyer should be permitted to apply Hammond branch costs for vendors for his analysis in Valparaiso. It bases its argument simply on the additional cost it would have to sustain to make still another study for this single comparison. But that is not

the point. A correct study should have been made in the first instance. Havemeyer's cost studies' deficiencies render his conclusion unpersuasive.

152. The Valparaiso study is also misleading. It attempts to calculate Borden's costs in its dealing with Marquardt who was an independent distributor. Borden's records, therefore, show its expenses of dealing with such independent distributor and not of its dealings with the distributors' customers with whom it had no relationship. Accordingly, if Havemeyer were to apply Valparaiso's expenses to stores served by those vendors, all or part of those expenses would have to be shown as applicable in that way. This has not been done. Some of the expense allocated to the non-A&P store in Valparaiso (Tittle), is made up of "provision-bad loans". [57] Any bad loans, however, made by Borden to its vendors would not be attributable to the stores to whom these vendors deliver, inasmuch as the Borden customer involved in the vendor account is the vendor and not the vendor's customer, a result reinforced by the fact that Tittle received no loan from Borden (Minard, Tr. 3223-3224). Nor can selling expense be ascribed to the Tittle store inasmuch as Valparaiso is not on a Borden route, Borden salesmen did not visit Tittle's store there (Minard, Tr. 3207-3208) and Tittle was not even a customer of the vendor which delivered to it (Marquardt, Tr. 1317). Similarly, there is no basis for allocating credit and collection costs to the Tittle store for the additional reason that it was not responsible for any credit loss (Minard, Tr. 3157). Tittle did not pay through a distributor (Marquardt, Tr. 1317). Borden's provision for bad accounts with milk distributors could not be applicable to Tittle. Further, since Tittle was never overdue (Minard, Tr. 3157) there could be no interest on overdue account.

v. Branch Selling Expense

153. Havemeyer's calculations in connection with branch selling expense—the expense related to the activities of Borden's salesmen—are also questionable. In this connection he estimated the number of points sold to independent stores, thus eliminating A&P sales and sales to schools and other non-store customers from consideration, and arrived at a branch selling expense per independent store point (RAPX 233, pp. 23, 16; Tr. 8492-8494). Such allocation was based on the assumption that the entire time of the salesman was spent in soliciting these particular store accounts and serving these accounts. But Mr. Daube, a Borden executive, testified that the salesmen "contacted new customers. . . . [h]is basic function was to develop and obtain new business for the company" (Daube, Tr. 9226-9227). Such missionary work is part of the selling expense of doing business on the part of Borden and it should be borne equally by all customers, A&P as well, on a volume basis (Lemberg, Tr. 9419-9420). Moreover, there is no record evidence to justify Havemeyer's elimination of non-store customers but only his belief that Borden would have special bulk wholesale salesmen who would call on bulk customers. He admitted, however, that there is nothing in the Borden expense account that shows that the salesmen do not call on non-store customers who are served by the wholesale routes (Tr. 8496-8497). In addition, the Borden-A&P contract provided that "Borden's salesmen's services will be supplied at the store level only, to follow [58] through on a complaint covering such matters as service, product or container" (CX 62Q). But no time has been computed by Havemeyer for such activities. The absurdity of this conclusion is demonstrated by the amount allocable to Jim's Groceries where Borden's salesmen visited maybe once a week or maybe once a month (Cox. Tr. 3992). But Havemeyer's allocations would run

about $165 for March 1966 (RAPX 233, pp. 23, 31). Nor did Havemeyer give any consideration to the fact that Borden incurred some selling expense in connection with the functions of Tarr and the salesmen who assisted him in servicing the A&P account (Tr. 8503). Yet Tarr spent almost all of his time in serving the A&P account (Tarr, Tr. 845-846, 897, 899). Finally, Havemeyer's approach on this function contradicts the treatment in his profitability study where he allocated some selling expense to A&P private label.

vi. Failure of Classification

154. Havemeyer's cost calculations are also flawed by his failure to classify customers in accordance with size, type of store, volume of purchases and other characteristics. In his profitability study he treated all independent stores as having one set of characteristics and A&P stores as having another. Thus, in RAPX 232 p. 89, he established various volume brackets for "other stores" but made no volume analysis for the A&P sales, despite the fact that 10 of the 88 A&P stores listed in the March 1965 breakdown of O'Hare sales took less than 300 points per delivery (RAPX 74). In calculating the number of points per case in May 1965, for all "other stores" Havemeyer examined the route books for 3 out of 17 routes in March 1966 and admitted that "there was not sufficient data to be certain of a variation of the points per case by size of store" (Tr. 7845). While admitting that it was highly unlikely these various size stores purchased the same number of points per case, he explained that "the data was not there unless you went through a tremendous analysis" (Tr. 7850). His resulting figure of 22 points per case for "other stores" is obviously quite arbitrary. Similarly, in connection with RAPX 233 and 234, Havemeyer gave no recognition to different classes of customers with different

cost experiences in connection with his allocations of delivery expense, clerical expense, product waste, selling expense, etc.

155. This failure of classification is hard to understand in view of Havemeyer's prior experience. The one [59] prior Robinson-Patman type cost study made by him was for Bowman Dairy in the case of *U.S.* v. *Borden,* 370 U.S. 460 (1962). His study was rejected by the Court at 471:

> In the [Bowman] study the experts charged all independents and no chain store with these costs. Yet it was not shown that all independents received these services daily or even on some lesser basis. Bowman's study indicated only that a large majority of independents took these services on a daily basis. Under such circumstances the use of these cost factors across the board in calculating independent store costs is not a permissible justification for it possibly allocates costs to some independents whose mode of purchasing does not give rise to them. The burden was upon the profferer of the classification to negate this possibility and the burden has not been met here.

There can be no doubt that there are vast differences between the characteristics of the various customers on Borden's routes, differences in physical size, layout of stores, purchase volume, services received and so on. Even the A&P stores had such differences. Havemeyer's studies here merely repeat the error made in his earlier Bowman study.

156. In the O'Hare and Hammond studies Havemeyer determined costs on an average basis for A&P stores and then compared this average with specific competitors. Thus, in his delivery cost analysis in RAPX 232, he proceeded on the basis that A&P was one single customer. This was

condemned, however, by the Commission in *National Dairy Products Corp.*, 70 FTC 79, 193-196, 207 (1966). The Commission stated:

> The Hearing Examiner rejected respondent's cost justification defense, in part, for the reason that discounts to multi-unit purchasers must be cost justified on a store-by-store basis. We agree . . . the averaging of purchases has no relationship to the cost actually incurred in dealing with each store (at p. 194). Thus, the largest independent customer respondent has in this area received only a 6 percent discount whereas a competing chain store unit of [60] the same volume receives 12 percent, not by virtue of any savings in cost to the store but solely by reason of its membership in the chain . . . In practice therefore respondent takes the over-cost justification in delivery to the large stores of a chain and credits this time saved to the smaller stores. In our view this is not a valid costing procedure under the Robinson-Patman Act (at pp. 194-195).

Yet this is exactly what has been done here. A&P stores in the Hammond area range from a low of only 17 plus cases per delivery to a high of 52 plus cases per delivery (RAPX 234, p. 19). Thus, although Burger's Market took more than 78 cases per delivery, the competing A&P store #325 took only 17.68 cases per delivery but this small A&P store was averaged out with larger A&P stores to hide the fact that there was such a huge disparity in size and purchase volume. Of course, by such averaging out, the fixed costs applicable to this store's operation become much less than they would be had the true volume been known since fixed costs are usually allocated on the basis of volume.

vii. Countervailing Costs

157. Nor did Havemeyer give adequate consideration to countervailing costs—costs necessary for the A&P business but not for other business. Reference has already been made to Havemeyer's failure to consider the expense of Tarr, the Borden employee whose activities were in great measure devoted to the A&P account. But Minkler, Malone, Gose and others in Borden's Chicago office also spent a very great amount of their time in getting and keeping the A&P private label business (Minkler, Tr. 125-279; Tarr, Tr. 849-889; Gose, Tr. 1045-1063; Malone DTR pp. 29-204); some of Borden's home office personnel in New York spent considerable time on that same account (Archer, Tr. 1209-1212, 1228, 1230) but Havemeyer made no special study of these expenses (Tr. 7757-7758, 9699-9710).

158. Moreover, it was often necessary to mix A&P label and Borden label products together on a pallet to make up a full pallet for an A&P store (Pergler, Tr. 5697-5698, 5700, 5702-5704). This mixing had to be done by hand [61] which would involve extra effort and expense which was, however, ignored by Havemeyer who stated that the mixing of products on pallets was done equally for everyone. But Havemeyer has not personally observed this procedure (Tr. 7980), and Pergler's testimony relates primarily to the A&P deliveries.

159. There may have been additional costs for A&P stores involved in connection with clerical expense. Thus, there was a daily delivery ticket for each individual store and a summary billing sheet for a number of stores in an area (Tr. 8484-8485). This additional summarization was not considered by Havemeyer (Tr. 8478-8486, 7716-7730). In addition, Borden had to include the retail price and extend the retail value for each product on a total basis

at A&P's request (RAPX 170, pp. 87-91; A&P Adm. March 12, 1973, p. 2, second par.). Despite this indication of countervailing costs Havemeyer made no study of the effect without which a true cost difference could not be ascertained (Lemberg, Tr. 9421-9422).

160. Furthermore, Havemeyer determined the clerical expense for A&P private label on the basis of the fact that private label represented 11/38's of the number of lines on a summary billing to A&P (RAPX 233, p. 11; Tr. 8478-8479). This ignores the fact that an A&P billing had 38 lines but the competitor's stores billing had at the most 27, the difference, 11, being the 11 private label items which A&P was purchasing but not the competitor stores. Thus, it would appear that clerical costs should have been determined by comparing the number of lines on the billings required for the two different stores which would result in a higher clerical cost in this connection for A&P stores than for the competing stores. In effect, A&P's purchases involved clerical expense in connection with the billing of the private label items, an expense which was not incurred by the competing stores which did not buy any private label items.

viii. General Selling and Administrative Costs

161. Havemeyer's calculations concerning general selling and administrative expense is also questionable. He first ascertained the "overhead cost" which he had selected from Borden's central office accounts (RAPX 233, pp. 5, 6). He then took the sum total of all other functional expenses which he had allocated to O'Hare customers, divided this total into the overhead cost, arrived at a resulting percentage figure and applied the percentage figure to the [62] total costs for the other seven functions which he had calculated for the O'Hare customers. These seven

branch functions, however, did not include production or transportation costs which, according to Havemeyer, totaled about $270,000 in May 1965 (RAPX 232, pp. 24, 33, 39), where as the branch expenses in March 1966 were calculated as being about $82,000 (RAPX 233, p. 6). It is only reasonable to assume that the central office would be concerned with the totality of Borden's operation and would spend some time concerning itself with production and transportation costs but none of such costs have been considered in this connection by Havemeyer. Instead, a very substantial amount of the overhead expense is allocated on the basis of the time the driver spends at the individual store since delivery expense is allocated on this basis. Thus, Jim's Groceries was a daily cash basis customer (RAPX 233, p. 69). His monthly purchase volume would be about 10,000 points (RAPX 233, p. 31) and Havemeyer would have this customer credited with having generated about $41 in expense for the Borden home office staff in March 1966 (RAPX 233, p. 41). Yet it is hardly likely that the home office would have any contact with Jim's Groceries. Similar results would apparently be reached for other cash customers (RAPX 233, pp. 60-63, 66, 69).

ix. Credit Loss

162. Still another questionable area with respect to Havemeyer's calculations arises in his treatment of credit loss. Havemeyer estimated the amount related to the wholesale business and allocated it equally per point among the 17 independent store purchasers on the Hammond wholesale routes. The "milk regular" account by Borden included both wholesale routes and retail home delivery routes (Tr. 8818-8819), Havemeyer allocated 12 percent of the expense to retail home delivery customers and 88 percent to wholesale customers (Tr. 8818), but ad-

mitted that if done a volume basis retail sales would account for about 25 percent (Tr. 8819). Havemeyer admits that this is a "bad account" expense record (Tr. 8826-8828; RAPX 234, p. 90) and there are substantial amounts attributed to "legal expense" and "interest overdue accounts". It would appear, therefore, that this account is primarily related to particular customers who are in arrears. With the exception of Wallies, all the independents had been extended credit for a maximum of 4 weeks (comparing the average weekly sales figure with the largest balance shown for each store). This would hardly constitute a bad account nor was it so regarded by Borden who continued to grant rebates to these stores (CX 288-289; CX 188, 191, 194-197, 200, 202). There was then [63] no reason to allocate that account's expenses to customers who had not contributed to such expense and if A&P was not so charged there was no reason for charging the independents, some of whom may have been as financially sound, if not more so, than A&P (CX 189, 192, 199, 203, *in camera*; CX 216-219, 221).

x. Advertising Expense

163. Still another area of doubt involves advertising expense. Four products were involved in this advertising (RAPX 90, p. 3) only one of which was involved in the Borden-A&P private label agreement (Bitting, Tr. 9334). Two of the other three products were sold only under the Borden label and the fourth item was not sold to any of the store customers in this area (Bitting, Tr. 9335). The one pertinent item represented only some $3,000 out of a total expenditure for all four of $114,000. Although Havemeyer argues that these advertisements are really advertisements of the entire line of Borden products, not just the named product, it was shown that each of the products involved was a new product which was being intro-

duced and Havemeyer did not know what was said in any of the advertisements (Tr. 9638-9655). Without such information there is no basis for assuming that the advertisements referred to more than the four products named. Even if such advertising represented institutional advertising the expense should be applied to all sales including those of private label since it represented a general expense of doing business and expanding sales (Lemberg, Tr. 9419-9420).

xi. The Availability Argument

164. Finally, A&P contends that complaint counsel seem to argue that even if Borden's prices to A&P were cost justified, A&P does not have a defense unless it can be also shown that those prices were offered on some kind of proportional basis to others. It bases this construction of complaint counsel's arguments on complaint counsel's language to the effect that the cost difference in this case is not due to differing methods or quantities of sale or delivery, which is a requirement under Section 2a of the Robinson-Patman Act, but the difference in availability, i.e., that Borden offered all stores the same type of service spelled out in the Borden-A&P private label contract, but at [64] a much higher price (CX 138; CX 62P-Q). Indeed, I have found that virtually the same service was offered by Borden to its non-A&P store customers (provided they had a certain volume of purchases) but at a maximum discount from list prices of not more than 30 percent compared to A&P's effective discount of more than 35 percent. A&P's logic would require competitors to accept the same service program at much less discount in order to preserve their rights under the Robinson-Patman Act, even if this meant compounding their loss or disadvantage by requiring them to incur more in-store service cost as the result of reduced service from Borden, without

an adequate discount to compensate them for it. As complaint counsel view this argument

> a buyer may legally discriminate in price if he wraps up the price package in service terms and offers the same service to others at a much higher, unattractive price, which the competitors cannot accept. The difference in service terms will then justify the price difference (complaint counsel's Proposed Findings, Vol. II, p. 299).

Such an obvious flout of the Robinson-Patman Act cannot be tolerated. Non-A&P stores were offered the same service terms enjoyed by A&P but were required to pay more. There was, however, no difference in Borden's cost savings as between the A&P stores and non-A&P stores receiving the same services. It follows, therefore, that no price differences could be justified thereby. It may be argued that the non-A&P stores did not take the limited service that A&P had and that, therefore, Borden actually experienced cost savings in its dealings with A&P that it did not experience in its dealings with the non-A&P stores. But Borden's preferential discounts were not "functionally available" to the non-favored customers who had to meet certain minimum volume purchases which A&P did not (*Morton Salt Co.*, 334 U.S. 37, 42 (1948)). It appears only proper to make cost comparisons in a seller's dealings with competing purchasers where such dealings are comparable and functionally available. The Act recognizes the need for like grade and quality of items sold. Certainly the same conditions of sale must exist before cost comparisons can be made. With the same conditions of sale offered all purchasers, no differences in costs could arise. A&P's inducement of a preferential price under such circumstances would violate the Act, particularly where, as here, the buyer knows that the price its competi-

tors are obliged to pay for their purchases is one which it, the buyer, refused to pay and succeeded in forcing the seller to reduce to that preferential level.

[65] xii. Conclusion

165. I conclude, therefore, that A&P's cost justification studies, RAPX 232, 233 and 234, are so defective and inadequate as to furnish no evidentiary basis for justifying A&P's preferential price for private label items on the basis of Borden's savings in costs.

VI. *The "Borden Defense"*

166. A&P argues that since Borden "admittedly" has a defense to a Section 2(a) charge by reason of meeting competition, and complaint counsel have not charged it with a violation, A&P cannot be guilty of violating Section 2(f). It should be noted, however, that Borden has not been adjudged to have a defense to a Section 2(a) charge by reason of meeting competition. Borden simply has not been charged by the Commission which has such discretion in issuing complaints. It cannot be said with certainty that, had Borden been charged with a 2(a) violation, it would have been able to defend such a charge successfully. It has been held that a seller cannot accept a buyer's story (such as one about a competitive offer) without more (*National Dairy* v. *FTC*, 395 F.2d 517, 528 (1968) where the court distinguished decisions in *Forster Manufacturing Co.* v. *FTC*, 335 F.2d 47, 54 (1964), *Beatrice Food Co., Inc.*, 68 *FTC* 286, 350 (1965) and *Continental Baking Co.*, 63 *FTC* 2071, 2164 (1963) in which efforts to verify were found). But even had Borden been able to defend such a charge successfully, the result would nevertheless be insufficient to exonerate A&P under the circumstances. Thus, in the *Kroger* case the supplier, Beatrice, was found

to have not violated 2(a) of the Act. Nevertheless, Kroger, the buyer, was found to have violated 2(f) of the Act:

> Kroger [contends] that as a matter of law the discharge of Beatrice requires the acquittal of Kroger because there cannot be a violation of Section 2(f) without there being one under Section 2(a). While ordinarily this may be true—a matter we need not pass upon—it is not true under the peculiar circumstances here, where Kroger was found by the Commission to have given "false price information" to Beatrice as to Broughton's competing bid (438 F.2d at 1374).

[66] Here, too, A&P gave false price information to Borden as to Bowman's competing bid. Although A&P argues that Kroger actively misrepresented the other bid but that A&P had a lower bid from Bowman, the fact remains that A&P represented to Borden that it had a bid which could be compared to Borden when, as a matter of fact, it did not, in view of the volume conditions and delivery conditions. Even if those differences could be ignored and the two bids compared, A&P represented to Borden that Bowman's bid was lower than Borden's when, as a matter of fact, A&P itself understood Bowman's bid to be higher than Borden's.

VII. *Commerce and By-Products*

167. A&P cites the provisions of the Robinson-Patman Act which make it unlawful

> . . . for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either

> or any of the purchases involved with such discrimination are in commerce . . .

It is not sufficient that the parties be engaged in commerce, the purchases involved in such discrimination must be in commerce. A&P's purchases from Borden were under a contract which covered sales and deliveries not only to its stores in Illinois where Borden's Woodstock plant was located but sales and deliveries to its stores in Indiana and elsewhere as well. It was not severable. The contract, therefore, covered purchases in commerce because it was multi-state in nature.

168. Moreover, Borden's supply of raw milk came from outside the state of Illinois and its processing into milk products did not interrupt the interstate flow of milk from farm to retailer. *Foremost Dairies, Inc.*, 62 FTC 1344 (1963) *aff'd.* 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); *Dean Milk Co.*, 68 FTC 710 (1965), *aff'd.* 395 F.2d 696 (7th Cir. 1968).

169. A&P argues that certain of the milk products were so processed as to make them separate and distinct commodities, thus breaking the interstate flow. It refers to products such as whipped cream, sour cream, eggnog, and onion dip, which allegedly were so physically, [67] biologically and chemically different from raw milk that the interstate flow of commerce was terminated at Borden's processing plant in Illinois. Nevertheless, those products were a relatively insignificant part of the contract entered into which was not severable. Whole milk constituted the great bulk of the sales under the contract and did not interrupt the interstate flow from the raw milk supply to the retailer. There is no basis for splitting the contract where the parties have not done so. To allow these insignificant products to control the legality of private label

purchases under such an indivisible contract would have the tail wag the dog.

C. *Count III*

170. Count III of the complaint alleges that A&P sold private label milk and other dairy products at the prevailing retail price level for vendor label milk and dairy products in spite of A&P's lower cost for the private label milk, thus maintaining the existing retail prices for milk and other dairy products. Borden for its part failed to pass on at the wholesale level price reductions similar to the reductions granted to A&P to other purchasers who compete with A&P. Respondents' course of conduct, it is alleged, constitutes a combination between respondents which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act.

171. The area involved for purposes of proof of this Count is the Chicago Standard Consolidated Area (SCA) consisting of the counties of Cooke, DuPage, Kane, Lake, McHenry and Will in the State of Illinois and the counties of Lake and Porter in Indiana.

172. A&P ranked third in total sales among the retail grocery chains operating in the Chicago area, its sales in 1965 amounting to 203 million dollars (CX 222A). It was a significant factor in the market and its competitors were careful to monitor A&P's prices (Lasorso, Tr. 2646; Cox, Tr. 3947-3948, 3986; Barney, Tr. 3686; Minard, Tr. 3147, 3152, 3153). Had A&P created a price differential on its private label milk, Scott Lad (a competing grocery) would have had to meet the lower price (Schaub, Tr. 3330).

173. Borden ranked either second or third in Class I milk sales among the dairy companies operating in the

Chicago area. It was an important market factor (Holin, Tr. 2965-2966, 2982-2987; Soldwedel, Tr. 3373-3374; Hitchner, Tr. 3596). Prior to the private label agreement Borden [68] was A&P's principal milk supplier for its Chicago unit and provided approximately 95 percent of A&P's milk supplies (Schmidt, Tr. 1678).

174. A&P and Borden competed with one another in the sale of milk and milk products at retail but the record in this proceeding does not establish clearly the dates of such retail deliveries by Borden nor the extent. Witnesses referred to Borden's retail sales as having lessened and ceased somewhere between 1963 and 1968. Thus, Borden's Gose testified that Borden had "some" retail routes when he left Borden's employ in 1968, but he added "I don't remember exactly, but we had considerably less . . ." (Tr. 1041). Later, however, Gose said that retail home deliveries were phased out "somewhere" between 1963 and 1968 (Tr. 1113). The President of Wanzer Dairy testified that Borden "could have had 21 or 22 routes . . . which means nothing in retail" (Soldwedel, Tr. 3406). The record does not establish with any degree of certainty that meaningful horizontal competition between A&P and Borden at the retail level existed at the time critical to this proceeding, 1965-1968.

175. Borden competed indirectly with A&P at retail by selling at wholesale its Borden brand milk to non-A&P stores competing with A&P at retail (Kuhlman, Tr. 5273). If A&P were to reduce its retail price competing retailers might be forced to lower their price of the Borden label products and seek cost reductions from Borden.

176. A&P had strong motivation to stabilize and maintain prices on milk and milk products. As noted earlier, as the result of its private label agreement with Borden

there was an expectation on the part of A&P to realize an estimated annual saving of approximately 820 thousand dollars. This saving could be realized only if A&P's profit margin was protected by the maintenance of the retail price (Kuhlman, Tr. 5230). A reduction of A&P's retail price would necessarily lower its net savings unless Borden reduced its price to A&P even further. This A&P could not expect. It had no better competitive bids and there was always the realization that there was some point beyond which Borden could not possibly recede despite its need for volume. A&P was also anxious that Borden not grant others the same lower price A&P enjoyed since if this were done, the A&P competitor might lower his retail out-of-store price and A&P might have been obliged to meet such lower price by reducing its retail price, thus losing some of the expected savings.

[69] 177. Borden similarly had strong motivation to maintain milk prices. Its newly completed processing plant at Woodstock, Illinois, had a very large capacity and A&P's Chicago Metropolitan Region alone accounted for over 55 percent of Borden's wholesale sales volume (CX 42D). If Borden was to maintain an efficient level of production at Woodstock it had to retain the A&P business (Minkler, Tr. 217; Kuhlman, Tr. 5230). A break in milk prices if A&P would reduce its out-of-store private label prices would harm Borden seriously:

> We have said all this before many times, but, we do hope A&P will price this private label and the advertised brand label the same, certainly to begin with. If private label out-of-store is dropped to reflect this 1¢ per point, this market will rock immediately, we think. We believe such a move on their part would destroy the present price level for advertised brands and would add explosive fuel to a war over the differential question. We know some competitors will be

strongly opposed to a difference in price for a private label. One big decision we have to make has to do with how low we will go to force acceptance of a differential. We folded up in Wisconsin because of a "no sales below cost" stipulation in the Wisconsin law. We have no such "out" in Illinois.

This is not exclusively a matter in our interest. We believe retailer's margins would eventually get caught in whatever upheaval takes place. With such a move on A&P's part—instead of an improvement in their overall margin, one point I am making is that their dairy department spread could collapse. If that should happen, they will not have gained anything by bringing private label and, certainly, we will have been knocked to our knees. (CX 7B)

[70] 178. In the Wisconsin situation referred to above, Borden was supplying milk to the Kroger stores both under the Borden brand and two secondary labels but at a lower price to Kroger for the milk products under the secondary labels. Kroger then lowered the retail price on these secondary labels which resulted in a chain reaction of price breaks in the prices of other dairies and chains forcing Borden to lower both its wholesale and retail prices on Borden label (Soberg, Tr. 2753-2756, 2759). A&P was also involved in this price war (Soberg, Tr. 2764-2765).

I—Complaint Counsel's Contentions

179. Complaint counsel contend that to stabilize and maintain the price of milk in Chicago

"all that was necessary in light of the market structure was for each party to agree or to arrange to assure the other that neither would do anything which would tend to disrupt the Chicago market or any milk prices therein. The agreement and/or arrangement of mu-

> tual assurances were comprised of and/or were supported by, *inter alia,* respondents' communications with one another, their exchanges of information, and their market knowledge and market conduct." (Complaint Counsel's Proposed Findings, Vol. I, p. 225)

180. With respect to respondents' communications with one another, complaint counsel cite record evidence indicating some discussion of market sensitivity between them. Thus, on February 9, 1965, Borden's Minkler wrote to Borden's Pentz about a conversation between A&P's Schmidt and Borden's Tarr:

> [W]hen Schmidt talked to Tarr yesterday he made it very plain that we had to be right. He said he very much appreciated the sensitiveness of this market and that he did not want to put this private label out for bids (CX 12).

Nor did Borden want this business put out for bids. As noted earlier in Minkler's internal letter (CX 7A, B) Borden was concerned about a "market upheaval" as a result of private label bids and believed that "retailers' margins would eventually get caught in whatever upheaval takes place . . . their dairy department spread could collapse . . . we will be knocked to our knees."

[71] 181. Complaint counsel also cite the meeting between A&P and Borden officials on or about May 26, 1965. Schmidt expressed a hope that the private label program might be productive of 500 thousand dollars annually. CX 19F states:

> In this regard, it was stressed that this type of product contribution could only result from the continuance of present out-of-store margins on fluid milk products

and referred to the Wisconsin price war. Complaint counsel contend that this comment, taken together with the discussion which took place concerning Borden's narrow profit margins, "was clear warning that A&P should not reduce the retail price on private label milk" Complaint Counsel's Proposed Findings, Vol. I, p. 227). It should be noted, however, that CX 19F does not indicate whether it was Borden or A&P which "stressed" the continuation of present margins.

182. Complaint counsel also cite the language of Borden in its price quotation to A&P in May 1965 (CX 18P). In it Borden says:

> In certain areas the primary basic price has recognized the depressed competitive situation prevailing in such markets. Such situations must eventually be corrected. It is considered that any economic improvement that occurs subsequently will be mutually recognized in accordance with the situations.

Complaint counsel's economic expert, Dr. Kuhlman, contends that the parties were discussing prices in the retail market (Kuhlman, Tr. 5232-5233, 5308-5309). According to Dr. Kuhlman:

> This constitutes in my mind a very clear and very explicit correspondence regarding the price of milk, and the fact that one of these companies is a supplier of milk to the other one can in no way be used to explain that this is not price fixing (Tr. 5233).

183. Complaint counsel also argue that Borden's right to terminate the private label agreement at any time helped [72] insure that A&P would not choose to alienate Borden as its supplier by reducing the retail price (Kuhlman, Tr. 5234).

184. Complaint counsel also cite the fact that the 820 thousand dollar annual saving offered by Borden to A&P under the private label agreement was not made on any straight discount basis but spread across 11 different product lines and argue that Borden influenced A&P's retail price because Borden determined how much of the savings A&P should realize on any individual product (Kuhlman, Tr. 5233-5234).

185. Complaint counsel also argue that A&P must have known that Borden was not prepared to give the same deal to competitors of A&P inasmuch as it had a constant flow of information regarding Borden's costs in connection with the private label pricing (Kuhlman, Tr. 5231). Similarly Borden knew about A&P's retail prices since A&P generally supplied Borden with its retail prices (A&P Adm. dated March 12, 1973, II D, p. 2).

186. Complaint counsel also cite the fact that when the private label program began and thereafter, A&P sold private label milk and dairy products at the prevailing retail price level for vendor label milk and dairy products. Similarly, Borden failed to pass on at the wholesale level price reductions similar to the reductions granted A&P to other purchasers who compete with A&P in the Chicago area, at least for two or three years after the commencement of the private label agreement with AP (Gose, Tr. 1095-1099).

187. Finally, complaint counsel cite the testimony of Dr. Kuhlman, its expert economic witness, who found a combination between the respondents to stabilize the price of milk (Kuhlman, Tr. 5229-5235). The evidence consisted of "mutual assurances", their post-contract behavior, their spreading of the savings across 11 different product lines and the fact that the agreement was terminable at will.

II. *Respondents' Reply*

188. It appears, however, that Borden's failure to offer the private label prices it granted to A&P to other customers immediately was because its Chicago sales manager, Gose, was instructed by Borden's law department that Borden could not make such offers to others and still rely on the meeting competition defense of the Robinson-Patman Act (Gose, Tr. 1076). Later, however, when it appeared that [73] Borden's competitors were selling at prices comparable to its private label prices to A&P, Borden solicited business at such prices (Dischner, Tr. 7165).

189. Respondents also cite the fact that John White was sales manager of A&P's Chicago unit at the time and that it was he who established the out-of-store prices without consultation with Schmidt, Bartels or Smith, whose authority was limited to purchasing the products. White did not know of the Wisconsin experience nor had he had discussions with Minkler, Tarr or Malone and was not involved in the private label negotiations (White, Tr. 2058-2063).

190. With respect to the internal Borden letter of December 28, 1964 (CX 7), Borden notes that Minkler spoke of the effect of an out-of-store differential between private and brand labels but notes that it neither called for nor requested any action and that neither the letter nor its contents were disclosed to A&P.

191. With respect to the "sensitivity of the market" which was brought up during the February 1965 meeting between Tarr and Schmidt, Borden argues that it reflected Tarr's fear that competitors might disregard overhead costs in bidding for A&P's business (Tarr, Tr. 872). Minkler also mentioned this to A&P's Bartels later (Minkler, Tr. 213-214).

192. With respect to the notation in Borden's May 1965 price quotation to the effect that "the primary basic price has recognized the depressed competitive situation prevailing" and "any economic improvement that occurs subsequently will be mutually recognized", Borden contends that this does not refer to prices in the retail market but to the fact that in some areas the prices bid by Borden were not based on Borden's costs due to competitive wholesale situations then existing and would have to be adjusted later to a cost basis. Even if the so-called depressed competitive situation referred to prices in the retail market the critical question is whether the "mutual recognition" to be given to any economic improvement thereafter does not necessarily refer to A&P's out-of-store prices but to acceptance of a higher price from Borden by A&P based upon cost rather than competitive situations. In any event, Schmidt told Tarr thereafter that A&P did not want the depressed market in the outside areas to be given special consideration in the bids but that all prices should be based on costs (RAPX 132A-C).

[74] 193. With reference to the May 26, 1965 meeting between A&P and Borden officials where A&P expressed its hope for a saving in the amount of 500 thousand dollars using the private label agreement and it was stressed that that amount could result only from the continuance of present out-of-store margins on fluid milk products (CX 19F), Borden rejects complaint counsel's interpretation of this language as a "clear warning" that A&P should not reduce its retail price. Borden's Malone testified that the statement was made to disabuse A&P of any possible belief that Borden would guarantee those savings and support A&P in a price war (Malone DTR pp. 217-218). See also Smith's testimony on rejecting Borden's July bid·

> [W]e didn't have any protection in case of a price war. If a price war broke out and we had to meet competitive retails for some period of time, that would be our expense instead of Borden's expense (Tr. 1361)

194. With respect to the spread of the savings over 11 different private label items, Borden notes that each item was ordered separately on a demand basis and that a single price for one year's purchases of all 11 items could not therefore be quoted.

195. Borden also disputes complaint counsel's conclusions on the terminable-at-will provisions of the private label agreement, arguing that such contracts are pro-competitive. It notes that the National Stores shifted from Dean Dairy to Hawthorn-Mellody, A&P from Bowman to Borden, Jewel from Borden to Dean, Hillman from Capitol to Wanzer, Wieboldt from Bowman to Wanzer, K-Mart from Beatrice to Borden and Eagle to Borden (Schaub, Tr. 3109); Soldwedel, Tr. 3392; Dischner, Tr. 7170-7175; Douglas, Tr. 3508-3510; Schmidt, Tr. 1765-1766; Gose, Tr. 1102). It also cites Borden's attempt to secure Kroger's milk business in 1965, 1966 and 1968 as well as its proposal to supply Consolidated Food, K-Mart, White Hen, National and Eagle (Gose, Tr. 1089-1102, 1131, 1170; Malone DTR p. 224-226; Markham, Tr. 7041). Moreover, Borden notes the inconsistency in complaint counsel's argument that Borden was dependent on A&P's business for the efficient operation of its Woodstock plant and Borden's situation was so precarious that it was compelled to grant whatever concessions A&P demanded, while at the same time complaint counsel argue that Borden was independent enough to use the terminable-at-will provisions of the contract with A&P to terminate the contract immediately if A&P lowered its retail price on private label milk.

[75] III—*Conclusion*

196. It is well settled that all combinations having any tendency or effect to tamper with price structure are unlawful. *U.S.* v. *Container Corp.*, 393 U.S. 333 (1969); *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *U.S.* v. *Parke-Davis & Co.*, 363 U.S. 29 (1960). The essence of a combination is the existence of concerted action between the parties, *U.S.* v. *Container Corp., supra.* The test is not so much the manner in which the parties combine as that there be a "collaborative element present" *Pearl Brewing Co.* v. *Anheuser-Busch, Inc.*, 339 F.Supp. 945, 951 (S.D. Texas 1972).

197. Complaint counsel cite the decision in *Sunny Hill Farms Dairy Co.* v. *Kraftco Corp.*, 381 F.Supp. 845 (E.D. Mo. 1974), arguing that the facts there were remarkably similar to this situation. Complaint counsel argue that *Sunny Hill* was a case in which the supplier, Sealtest, was asked to provide the buyer, Malone & Hyde, with private label milk at a lower cost than Sealtest sold its own brand label to it. Subsequently Sealtest and Malone & Hyde engaged in discussions concerning price wars, depressed markets and limited retail price differentials; the court found an agreement between the defendants to fix prices at both the vertical and horizontal levels. Complaint counsel cite the testimony of one of the witnesses to the effect that Sealtest advised the buyer to guard against getting into a price war by lowering the price of milk. They also cite testimony in the *Sunny Hill* case to the effect that there was conversation between the defendants about the out-of-store price. Counsel for A&P, however, point out that by order dated July 19, 1974, the Judge in the *Sunny Hill* case withdrew and vacated his memorandum and dismissed the complaint. Nevertheless, complaint counsel urge the logic of that decision. A&P points out, however, that in *Sunny Hill* the court found that the defendants were

independent and *competing* suppliers of milk to certain grocery stores which followed the recommendations of Malone & Hyde. Thus, Malone & Hyde had certain limited control over the marketing programs of such stores. The court then found that the "record is replete with evidence indicating that Sealtest and Malone & Hyde *agreed* upon the into-store prices of their competitive products" and found illegal horizontal price fixing in such agreement *between competing milk suppliers*, Sealtest and Malone & Hyde. As respects the fixing of out-of-store prices, [76] the court found that Section 1 of the Sherman Act was violated by a "*commitment* to a common scheme or to some type of joint action . . . stated in another fashion the quintessential yardstick for conduct deemed violative of Section 1 is whether or not there is a collaborative element present". The court added:

> An agreement to fix the maximum resale price is also proscribed because "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." . . . the eclectic criteria that can be gleaned from these cases for the ascertainment of a violation is whether the agreement or conduct interferes with the freedom of sellers or traders in such a manner as to *prohibit or restrain their ability to sell in accordance with their own judgment*, and not what particular effect the agreement or conduct has on the actual prices (Emphasis added).

The court then noted that Malone & Hyde sought a price differential in the two different labels of milk whereas Sealtest was desirous that the two labels be priced the same. The parties, however, finally agreed to a price differential. Thereafter, the court found that there was the necessary implementation to effectuate actual retail price

maintenance by Malone & Hyde's control over its affiliates saying "there is direct evidence that *Malone & Hyde dictated the out-of-store price* to its affiliates." The court found in *Sunny Hill* that there was "more than a mere non-biding resale price recommendation but a subtle mode of dictating resale price."

198. Thus, aside from the fact that the Judge in *Sunny Hill* withdrew his memorandum and vacated it, the logic of his earlier position is apparently inapplicable here. Unlike *Sunny Hill*, there was no express or explicit agreement between A&P and Borden concerning A&P's price differential for private label milk. The agreement, instead, was limited to the Borden price to A&P for such private [77] label milk and the differential in such cost compared to the Borden label cost to A&P. Although there was some discussion of price both in this case as well as in *Sunny Hill*, there is no reason to assume that the court in *Sunny Hill* would have reached the same conclusion absent a finding of an express agreement between the parties concerning a price differential on resale.

199. Here Borden as well as A&P had the same objectives in mind: the maintenance of the Borden label level of prices for the private label products. For Borden this was preferable because it avoided the likelihood of a price war in which retailers would seek financial help from Borden, their supplier. For A&P this was also preferable because it maximized their profits on dairy items by lowering the costs of some of them. Under such circumstances had the parties then agreed to the maintenance of such level of prices there would of course, have been a violation of law. There is, however, no evidence in this record which would suggest that Borden ever spoke to A&P about A&P's resale prices on private label items except to note that a differential might create problems. A&P never gave

Borden any assurances that it would not create such a differential. The "mutual assurances" on which complaint counsel rests Count III of the complaint are not found in this record. It must be borne in mind that A&P approached Borden about private label milk in an effort to maximize its profits in dairy products by securing the private label at a lower cost. It was only natural, therefore, for A&P as well as for Borden to note the mathematical fact that if A&P lowered its price on private label milk it would not realize the increase in profit that it sought since the demand was inelastic and lowering the price would not increase sales (Markham, Tr. 7038). This realization constitutes no assurance from either party. Similarly, it was an open secret that Borden needed the A&P business or something its equivalent for the efficient operation of its new Woodstock plant. Consequently Borden would go to great lengths to avoid losing such a customer including a reduction in price to a level it felt its competitors might offer in an effort to lure the A&P business away from Borden, that is, to a level which barely covered, if at all, the mere direct costs. Borden's failure to offer similar savings to other chain stores immediately thereafter has been explained and there appears nothing unreasonable in this point of view. In short, [78] the behavior of the respondents in pricing the private label items was the behavior that one would expect of any rational businessman independently pursuing only his self-interest in markets such as those found in this case. The circumstantial evidence of agreement is equally consistent with a finding of independent action.

> To sustain a finding of fact the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. Circumstantial evidence, even in a civil case, is not

> sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion or where they give equal support to inconsistent conclusions (*Pevely Dairy Co.* v. *United States*, 178 F.2d 393 (9th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950).

See also *Virginia-Carolina Peanut Association*, 51 FTC 1156, 1188 (1955).

200. A&P's failure to pass on to the consumer its savings on private label milk are not necessarily indicative of any collusion. As complaint counsel's witness Kuhlman put it:

> The non-collusive oligopolist in an industry having a relatively inelastic demand will be unlikely to pass the benefits of cost reduction programs on to the consumer (Kuhlman, Tr. 5312).

201. I conclude, therefore, that complaint counsel have not met their burden of proof to show that the respondents herein have combined to effect a stabilization and maintenance of prices for milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act.

D. *The Denial of Due Process*

I. A&P's Contentions

202. A&P contends that it has been denied procedural due process in the presentation of its defenses and in its ability to cross-examine complaint counsel's witnesses due [79] to the loss of witnesses and documentary evidence that would have been available but for the Commission's delay in issuing the complaint. The Commission ruled on January 19, 1973:

> . . . The time taken to conduct the investigation leading to the issuance of the complaint herein is neither atypical nor inordinate, particularly in view of the complexity of the investigation and the limited manpower available to the Commission for conducting investigations in connection with its varied and broad statutory responsibilities. Moreover, it seems clear from the pleadings and affidavits before us that respondents were timely alerted to the fact that the Commission was interested in the private label arrangement between them in the Chicago trading area from the standpoint of possible violations of the amended Clayton Act and Section 5 of the Federal Trade Commission Act. And there is no indication that either A&P or Borden was ever advised that the Commission had abandoned its investigation. On the contrary, the papers before us clearly indicate that attempts to pursue and complete the investigation were made by Commission's staff on a continuing and regular basis during the period March 1967-December 1969.

The Commission went on, however, to note that

> . . . the question of alleged unfair prejudice to A&P by possible denial of adequate opportunity to defend is one which cannot be answered now, but only at the conclusion of hearings.

a. The Unavailability of Documents

203. A&P contends that its defense in this case was hampered because its subpoenas proved unfruitful and that the lack of response thereto was occasioned by loss or destruction of documents due to the passage of time. In this connection, it offered RAPX 135 and 136, being summaries of the subpoenas directed to retail stores and

dairies, respectively. In these exhibits there are repeated references by the deponents of the subpoenas involved that "no documents are available" in response to [80] certain specifications of the subpoenas. It does not appear, however, that the unavailability of the documents was necessarily due to the passage of time. Thus, at page 7283 of the transcript Mr. Dembrow, an attorney for A&P, was asked why documents not produced were "not available". The following testimony then took place:

> "The Witness: No, I would have no other information as to why they did not supply us with the documents. All I know is we never received any documents that were responsive in whole or in part to the specifications in question.
>
> Judge Hinkes: And that we are not to assume from that type of a response that the documents ever existed or were destroyed earlier or were simply not found by the Respondents or any other reason for their non-response?
>
> The Witness: Well, I think in general, Your Honor, that is correct . . ."
>
> * * *
>
> "Judge Hinkes: All I am saying is do we have any evidence—I don't want the assumptions now. Does this document contain reasons for the non-response in evidence?
>
> The Witness: No, the reason for non-response is not indicated except in those few instances where I think Complaint counsel pointed to one that was not in the Chicago metropolitan area. Something like that or one that was not selling to wholesale stores.
>
> Judge Hinkes: I am only speaking now of the responses where nothing was said except 'No documents available' and was signed by the dairy.
>
> [81] The Witness: That simply means that we physically . . . by 'we' I mean the respondents—cannot re-

ceive documents or information in letter form that pertained to specific items in our subpoenas.

Judge Hinkes: And this exhibit contains no explanation for that failure, is that correct?

The Witness: That would be correct, Your Honor."

204. In many instances the records sought were never kept or, if kept, were only so maintained for a brief period of time and then discarded. See, for example, the affidavit of Bruce Spear, an attorney for A&P, constituting an attachment to A&P's motion of October 13, 1972, to dismiss the complaint. In it, Mr. Spear relates his interviews with certain retail store operators. Some of them spoke of discarding records after maintaining them for only two to six months. Others discarded records after their replacement by more current schedules. Still others discarded them after completion of the tax audit. Another said that he doubted that records were kept other than on a current basis.

205. It is thus clear that even had the complaint been issued within a reasonably short period of time following the commencement of the investigation such records would have been unavailable even then and their unavailability to A&P when the complaint was issued years later cannot be the result of the passage of such time.

b. The Unavailability of Witnesses

206. A&P also contends that as a result of the delay by the Commission in instituting this proceeding the testimony of certain individuals who died in the interim became unavailable. Thus, Joseph Malone, Borden's Vice-President, Regulatory Controls, and formerly Comptroller, died prior to the start of hearings in this matter. His deposition, however, had been taken by complaint counsel

and it was received in evidence (CX 262). A&P contends, however, that it had not yet begun its program of discovery when the deposition was taken nor had it begun its cost study of the private label [82] prices received by A&P. Consequently, "detailed probing examination of Malone which was essential to the proper resolution of the various issues surrounding Borden's cost of serving A&P and the cost of serving its non-A&P customers . . . was not possible".

207. Complaint counsel filed their application for taking the deposition of Mr. Malone on November 4, 1971. Said application was granted by the Administrative Law Judge by order dated November 8, 1971, in which the Judge noted:

> The application states the complaint to involve a private label milk arrangement between respondents A&P and Borden beginning in 1965 and continuing to date. The negotiations giving rise to the agreement are stated to extend back to 1964 with the three principal negotiators for Borden during 1964 and 1965 to be now retired from said company. . . . The three negotiators are described as now being elderly and their testimony to be of importance to proof of the charges of the complaint. [One of the three negotiators was identified as Joseph Malone]

The order went on to describe the nature of the expected testimony in considerable detail, specifically referring to "Borden's relationships and dealings with A&P and competing retail grocery purchasers in the Chicago area . . . The witnesses' own roles in the dealings with A&P concerning the Chicago area private label arrangement . . . the pricing and sales practices of Borden in connection with its sales to A&P and competing purchasers in the Chicago area, etc." Pursuant to said order Malone first

took the stand on December 3, 1971. Counsel for each of the parties attended said appearance but due to a dispute regarding Malone's request for immunity his testimony was then postponed until February 9, 1972. At that time Malone was examined by complaint counsel and cross-examined by counsel for both Borden and A&P.

208. Considering that A&P was on notice of Malone's testimony as early as November 8, 1971, attended Malone's first appearance on December 3, 1971, as well as his actual testimony on February 9 and 10, 1972, at which time it participated in the examination of the witness; considering [83] also that A&P under the Commission's Rules was also entitled to take the deposition of Mr. Malone at any time either for discovery purposes or to preserve evidence but failed to do so; and considering also that A&P was able to use Mr. Daube who worked for Borden in the Chicago central district from 1958 until 1966 as Chief Accountant and Assistant District Controller and then became Assistant to the District Controller when the Chicago Central District was merged with the Midwest District in Columbus, Ohio (Daube, Tr. 5864-5870), I conclude that A&P's failure to examine Mr. Malone prior to his death is attributable to its neglect or failure to take advantage of the opportunities and rights it had as a party to this proceeding and in any event, was not prevented by any delay in the institution of this proceeding.

209. A&P also claims prejudice to its case resulting from the unavailability of David Parmalee, Bowman's Senior Cost Accountant, who died prior to the start of hearings. It appears, however, that A&P interviewed Mr. Parmalee after the complaint was filed and it is only reasonable to assume that if Mr. Parmalee's testimony would be helpful, A&P would have followed complaint counsel's example with Mr. Malone and taken his deposition as well (affidavit

of Denis McInerney, October 13, 1972, page 13). Moreover, A&P admits that Parmalee's testimony would have merely supplemented Cannon's testimony who did appear and testify (A&P Proposed Findings, Volume 1, p. 508). Here, too, therefore, A&P's failure to have Parmalee's testimony is due to its own oversight rather than any delay in the institution of this proceeding.

210. A&P also cites the unavailability of the testimony of L. Edward Hart, an attorney who worked very closely with Bowman's management in connection with a court order prohibiting discriminatory prices by Bowman. Mr. Hart died prior to the start of the hearings but it is doubtful that his testimony would be received in evidence inasmuch as a claim of privilege in connection with his work as an attorney for Bowman could be expected. Moreover, the testimony of Mr. Hart, like that of Mr. Parmalee, would have been only supplementary to that of Mr. Cannon who did testify (A&P Proposed Findings, Vol. 1, p. 508).

211. A&P notes that testimony of two other witnesses was unavailable due to their deaths prior to the start of hearings. One of these was Walter Roney, Chief Executive Officer for High-Low Foods. His death, however, occurred in 1969 (A&P Proposed Findings, Vol. 1, p. 501). The [84] unavailability of his testimony, therefore, can hardly be attributed to any unreasonable delay in the institution of this proceeding. The other witness referred to by A&P is Fred Nonnamaker, a former Bowman Company employee who died prior to the filing of the complaint. It was his death that prompted complaint counsel to seek the depositions of Messrs. Malone, Minkler and Tarr on November 4, 1971. Presumably, complaint counsel was seeking testimony which could be used against A&P and this could explain A&P's failure to seek Nonnamaker's

deposition any earlier. In any event, his unavailability is a loss to all of the parties in this proceeding. A&P has failed to demonstrate any particular prejudice to it as a result of his death prior to the start of hearings.

212. The record in this proceeding makes it clear that both A&P and Borden were aware, even before service began under their contract, that their private label arrangement would probably result in litigation (Smith, Tr. 1429). Certainly, the Commission's investigation of this case was brought to the attention of Borden and A&P as early as February 1967 when an attorney-examiner for the Commission contacted both respondents requesting certain data and supporting interviews with company personnel concerning the private label agreement between the respondent and possible violations of the Clayton Act and the Federal Trade Commission Act. All of this has already been called to the attention of the Commission in connection with A&P's motion to dismiss the complaint filed on October 13, 1972, and complaint counsel's answer thereto filed on October 20, 1972. If, indeed, A&P failed to prepare itself for its defense to the complaint that was issued later, its failure must be deemed the result of its own oversight and neglect, having been repeatedly put on notice and having obviously realized even before the commencement of the private label agreement that some litigation was likely in connection therewith. The Commission took steps to prepare for such litigation although it, too, experienced the loss of some witnesses and data. For example, potential witness Nonnamaker died before his deposition could be taken. He had testified in the Dean-Bowman case, Docket 8674 to the effect that Bowman's relationship with A&P was such that it could not expect to obtain any A&P business under any circumstances (Docket 8674, Tr. 2207-2208). ("Bowman couldn't get [the

A&P account] if the Lord Himself were their solicitor"). Such testimony in this proceeding would have demonstrated that the Bowman offer to A&P was a sham and could not be used legitimately by A&P for a meeting competition defense.

[85] 213. I conclude, therefore, that there has not been an unjustifiable delay in the filing of the complaint considering the difficulty the Commission experienced in marshalling its evidence from the respondents. As the Commission noted in its order of January 19, 1973,

> The time taken to conduct the investigation leading to the issuance of the complaint herein is neither atypical nor inordinate, particularly in view of the complexity of the investigation and the limited manpower available to the Commission.

In addition, any prejudice experienced by the respondents herein by the passage of time between the commencement of the investigation and the issuance of the complaint herein, appears to be minimal and the result of the respondents' indifference to the likelihood of litigation resulting from their private label agreement which they themselves anticipated and which was brought to their attention by the activities of the Commission as early as February 1967.

Conclusions of Law

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents The Great Atlantic & Pacific Tea Company, Inc., (hereinafter A&P) and Borden, Inc. (hereinafter Borden).

2. The complaint herein states a cause of action and this proceeding is in the public interest.

3. Respondent A&P in the course and conduct of its business in commerce has acted unfairly and deceptively in purchasing milk and dairy products from Borden in that it accepted a price offer from Borden tendered on a meeting competition basis when in fact such meeting competition defense was not available and without informing Borden of this fact in violation of the policy of Section 2 of the amended Clayton Act and in violation of Section 5 of the Federal Trade Commission Act.

4. Respondent A&P in the course and conduct of its business in commerce has knowingly induced or received a discrimination in price in the purchase of fluid milk and other dairy products in violation of subsection (f) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

[86] 5. Complaint counsel have not satisfied their burden of proof to show that respondents A&P and Borden in the course and conduct of their business in commerce entered into a combination which had a tendency or effect of stabilizing and maintaining prices for milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act.

The Remedy

As a result of the failure of proof in connection with Count III of the complaint, a dismissal of said Count will be ordered.

As respects Count I of the complaint, complaint counsel propose that A&P be directed to inform prospective suppliers who submit prices on a meeting competition basis if the price offered beats existing competitive offers. It is contended that such requirement does no more than obli-

gate A&P to comply with its statutory duties. The order proposed, however, would cover not only milk and other dairy products but any product. Moreover, if A&P informs a supplier that a competitive offer has been made to A&P and a supplier makes an offer based on the meeting of the competitive offer, A&P would be required under the proposed order to notify the supplier that the price being offered is below the existing competitive offer to A&P if such be the case.

With respect to Count II of the complaint, complaint counsel's proposed order would direct A&P not to violate Section 2(f) of the Robinson-Patman Act again in any product line rather than merely in milk and other dairy products. Moreover, the proposed order would prohibit A&P's inducement, receipt or/and acceptance of a net price which it knows or should know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers competing with A&P unless A&P *shows* that it knew or had reason to believe that the price difference in its favor was cost justified on the basis of differing methods or quantities or said price was granted to meet a lawful equally low price of a competitor.

With respect to the proposed coverage of all products in both Count I and Count II of the complaint, complaint counsel contend that A&P's violation was "not an isolated incident relating to milk. Rather it was an action in the context of A&P's entire business"; and that without such coverage "A&P could easily evade the order simply by turning its attention to other areas in its diverse product line where similar anticompetitive practices would be equally fruitful".

[87] It is well settled that the Federal Trade Commission has wide discretion in its choice of the remedy adequate to cope with the unlawful practices disclosed. *FTC*

v. *Ruberoid Co.*, 343 U.S. 470 (1952). The validity of the Commission order is gauged by its reasonable relation to the unlawful practices found to exist. *FTC* v. *Colgate-Palmolive*, 380 U.S. 374 (1965); *National Lead Co.* v. *FTC*, 352 U.S. 419 (1957). A&P points out, however, that the Commission itself has recognized situations where a broad order would not be appropriate, *Quaker Oats Co.*, 60 FTC 798 (1962). In that case the order was limited to "cat food and products related to cat food". Similarly, in *National Dairy Products Corp.* v. *Federal Trade Commission*, 412 F.2d 605 (7th Cir. 1969) the order was limited to the product line of the single division found to have made the unlawful discriminations. See also *American Home Products Corp* v. *Federal Trade Commission*, 402 F.2d 232 (6th Cir. 1968).

It is particularly noteworthy that complaint counsel have drawn a parallel between this case and the *Kroger* case, 76 FTC 719 (1969). There, as here, the buyer went beyond the bounds of permissible bargaining by misquoting the competitive offer or failing to convey correct information. The order issued in the *Kroger* case was limited to milk and other dairy products despite the fact that Kroger, a national grocery chain, obviously had other products which could be subject to the same abuse. In that case, however, the order was not limited to the Charleston division of Kroger where the discriminations took place but to "outlets operated by respondent". Consequently, the order herein will be limited to fluid milk and other dairy products but will apply to A&P's outlets wherever operated by A&P.

As respects Count II, A&P argues that it cannot comply with the order proposed by complaint counsel because of the burden on A&P. It contends that it would be enjoined from receiving a net price on any product which it knows or should know is below the net price at which the product is being offered to any A&P competitor unless A&P is able to demonstrate that it knew or had reason to believe

that the lower price to A&P was cost justified or that the lower price was given to A&P to meet a lawful, equally low price offered to A&P by another supplier. It argues that this would require A&P to cost justify its suppliers' prices, [88] a burden which cannot be properly placed on a buyer who cannot obtain the costing information required (*Automatic Canteen Co.* v. *FTC*, 346 U.S. 61 (1953).

A&P, however, confuses the burden of proof requirement with the obligation of law. A&P cannot induce or accept a discriminatory price from a supplier where it knows or has reason to know that the lower price to it cannot be cost justified or that the lower price given to it was not to meet a lawful equally low price offered by another supplier. The burden of proof, however, remains with complaint counsel under the doctrine of *Automatic Canteen*. This is not unlike the situation in Count I where A&P is forbidden to engage in misrepresentations but the burden of proving the misrepresentations still rests upon complaint counsel. A&P's objection to the proposed order with respect to Count II, therefore, is reasonable only to the extent that it suggests shifting the burden of proof to A&P. The order herein corrects that error.

A&P also objects to the proposed order arguing that other statutory defenses available to it are excluded by the language of the order since it does not mention such defenses as lack of knowledge of the discrimination or lack of injury to competition. This argument was also raised in the *Ruberoid* case, *supra*;

> [The absence of such provisos] cannot preclude the seller from differentiating in price in a new competitive situation involving different circumstances where it can justify the discrimination in accordance with the statutory provisos.

In that case the order simply prohibited Ruberoid from discriminating in price by selling its products to any pur-

chaser at prices lower than those granted other purchasers who compete with the favored purchaser in the resale of the products. The court found it unnecessary to specify the statutory defenses. Here, too, unmentioned statutory defenses available to A&P have not been negated nor lost to A&P by reason of their omission.

[89] ORDER

IT IS ORDERED that respondent, The Great Atlantic & Pacific Tea Company, Inc., a corporation, and its officers, representatives, agents and employees, directly or through the use of any corporate or other device in or in connection with the offering to purchase or purchase of fluid milk and other dairy products in commerce as "commerce" is defined in the amended Clayton Act, for resale in outlets operated by the respondent, do forthwith cease and desist from:

(a) misleading any supplier of fluid milk or other dairy product by misrepresenting a material fact which could reasonably be expected to affect the suppliers' price to A&P; and

(b) directly or indirectly inducing, receiving or accepting from any seller a net price it knows or should know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers where A&P is competing with the purchaser paying the higher price, unless A&P knew or had reason to believe that the price difference in its favor made only due allowance for cost differences resulting from differing methods or quantities in which such products are sold [90] or delivered to such purchasers or said price was granted to it by the supplier to meet a lawful equally low price of a competitor. For the purpose of determining the "net price" under the terms of this order there shall be taken

into account all discounts or other terms and conditions of sale by which net prices are effected.

IT IS FURTHER ORDERED that A&P shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHER ORDERED that A&P shall notify the Commission at least thirty days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect its compliance obligations arising out of the order.

IT IS FURTHER ORDERED that A&P shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied and will comply with this order.

IT IS FURTHER ORDERED that Count III of this complaint be, and the same hereby is, dismissed.

/s/ HARRY R. HINKES
Harry R. Hinkes
Administrative Law Judge

September 24, 1975

PRICES PAID FOR MILK BY A&P COMPARED TO LOWEST PRICE AVAILABLE TO ITS COMPETITORS IN THE "CHICAGO & SUBURBS AREA" 11/65–12/68

HOMO—HALF-GALLONS—PAPER

		Non-A&P Stores		A&P Stores		
Date	Borden List Price[1]	Minimum Price	Maximum Discount From List Price[2]	Private Label Price[3]	Discount From List Price	Percent Overcharge[4]
11/65–1/66	$0.49	$0.3479	29.0%	$0.3124	36.2%	11.4%
1/66–2/66	.49	.3430	30.0%	.3124	36.2%	9.8%
2/66–5/66	.51	.357	30.0%	.3254	36.2%	9.7%
5/66–8/66	.52	.364	30.0%	.3254	37.4%	11.9%
8/66–9/66	.54	.378	30.0%	.3376	37.5%	12.0%
9/66–10/66	.56	.392	30.0%	.3514	37.3%	11.6%
10/66–11/66	.56	.392	30.0%	.3534	36.9%	10.9%

[1] Source: CX 137, 139-150.
[2] Sources: CX 120, 138; Gose Tr. 1110.
[3] Source: CX 255B.
[4] Calculated by dividing the difference between the minimum price paid by others and the private label price by the private label price paid by A & P.

Date	Borden List Price	Non-A&P Stores: Minimum Price	Non-A&P Stores: Maximum Discount From List Price	A&P Stores: Private Label Price	A&P Stores: Discount From List Price	Percent Overcharge
11/66–3/67	$0.56	$0.392	30.0%	$0.3514	37.3%	11.6%
3/67–4/67	.55	.385	30.0%	.3376	38.6%	14.0%
4/67–5/67	.55	.385	30.0%	.3416	37.9%	12.7%
5/67	.57	.399	30.0%	.3502	38.6%	13.9%
5/67–9/67	.57	.399	30.0%	.3534	38.0%	12.9%
9/67–5/68	.59	.413	30.0%	.3664	37.9%	12.7%
5/68–7/68	.61	.427	30.0%	.3762	38.3%	13.5%
7/68–12/68	.62	.434	30.0%	.3828	38.3%	13.4%

HOMO—GALLONS—PAPER

Date	Borden List Price	Non-A&P Stores		A&P Stores		
		Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
11/65–1/66	$0.98	$0.6958	29.0%	$0.6248	36.2%	11.4%
1/66–2/66	.98	.686	30.0%	.6248	36.2%	9.8%
2/66–5/66	1.02	.714	30.0%	.6508	36.2%	9.7%
5/66–8/66	1.04	.728	30.0%	.6508	37.4%	11.9%
8/66–9/66	1.08	.756	30.0%	.6752	37.5%	12.0%
9/66–10/66	1.12	.784	30.0%	.7028	37.3%	11.6%

Date	Borden List Price	Non-A&P Stores: Minimum Price	Non-A&P Stores: Maximum Discount From List Price	A&P Stores: Private Label Price	A&P Stores: Discount From List Price	Percent Overcharge
10/66–11/66	$1.12	$0.784	30.0%	$0.7068	36.9%	10.9%
11/66–3/67	1.12	.784	30.0%	.7028	37.3%	11.6%
3/67–4/67	1.10	.770	30.0%	.6752	38.6%	14.0%
4/67–5/67	1.10	.770	30.0%	.6832	37.9%	12.7%
5/67	1.14	.798	30.0%	.7004	38.6%	13.9%
5/67–9/67	1.14	.798	30.0%	.7068	38.0%	12.9%
9/67–5/68	1.18	.826	30.0%	.7328	37.9%	12.7%
5/68–7/68	1.22	.854	30.0%	.7524	38.3%	13.5%
7/68–12/68	1.24	.868	30.0%	.7656	38.3%	13.4%

HOMO—QUARTS—PAPER

Date	Borden List Price	Non-A&P Stores: Minimum Price	Non-A&P Stores: Maximum Discount From List Price	A&P Stores: Private Label Price	A&P Stores: Discount From List Price	Percent Overcharge
11/65–1/66	$0.265	$0.1882	29.0%	$0.1712	35.4%	9.9%
1/66–2/66	.265	.1855	30.0%	.1712	35.4%	8.4%
2/66–5/66	.275	.1925	30.0%	.1777	35.4%	8.3%
5/66–8/66	.28	.1960	30.0%	.1777	36.5%	10.3%
8/66–9/66	.29	.2030	30.0%	.1838	36.6%	10.5%
9/66–10/66	.30	.2100	30.0%	.1907	36.4%	10.1%
10/66–11/66	.30	.2100	30.0%	.1917	36.1%	9.6%
11/66–3/67	.30	.2100	30.0%	.1907	36.4%	10.1%
3/67–4/67	.295	.2065	30.0%	.1838	37.7%	12.4%
4/67–5/67	.295	.2065	30.0%	.1858	37.0%	11.1%
5/67	.305	.2135	30.0%	.1901	37.7%	12.3%

Date	Borden List Price	Non-A&P Stores: Minimum Price	Non-A&P Stores: Maximum Discount From List Price	A&P Stores: Private Label Price	A&P Stores: Discount From List Price	Percent Overcharge
5/67–9/67	$0.305	$0.2135	30.0%	$0.1917	37.2%	11.4%
9/67–4/68	.315	.2205	30.0%	.1982	37.1%	11.3%
4/68–7/68	.325	.2275	30.0%	.2031	37.5%	12.0%
7/68–12/68	.33	.2310	30.0%	.2064	37.5%	11.9%

2% MILK—½ GALLON—PAPER

Date	Borden List Price	Non-A&P Stores: Minimum Price	Non-A&P Stores: Maximum Discount From List Price	A&P Stores: Private Label Price	A&P Stores: Discount From List Price	Percent Overcharge
11/65–1/66	$0.46	$0.3266	29.0%	$0.2914	36.7%	12.1%
1/66–2/66	.46	.3220	30.0%	.2914	36.7%	10.5%
2/66–5/66	.48	.3360	30.0%	.3044	36.6%	10.4%
5/66–8/66	.49	.3430	30.0%	.3044	37.9%	12.7%
8/66–9/66	.51	.3570	30.0%	.3166	37.9%	12.8%
9/66–10/66	.53	.3710	30.0%	.3304	37.7%	12.3%
10/66–11/66	.53	.3710	30.0%	.3324	37.3%	11.6%
11/66–3/67	.53	.3710	30.0%	.3304	37.7%	12.3%
3/67–4/67	.52	.3640	30.0%	.3166	39.1%	15.0%
4/67–5/67	.52	.3640	30.0%	.3206	38.4%	13.5%
5/67	.54	.3780	30.0%	.3292	39.0%	14.8%

Date	Borden List Price	Non-A&P Stores: Minimum Price	Non-A&P Stores: Maximum Discount From List Price	A&P Stores: Private Label Price	A&P Stores: Discount From List Price	Percent Overcharge
5/67–9/67	$0.54	$0.3780	30.0%	$0.3324	38.4%	13.7%
9/67–5/68	.56	.3920	30.0%	.3454	38.3%	13.5%
5/68–7/68	.58	.4060	30.0%	.3552	38.8%	14.3%
7/68–12/68	.59	.4130	30.0%	.3618	38.7%	14.2%

SKIM MILK—½ GALLON—PAPER

Date	Borden List Price	Non-A&P Stores: Minimum Price	Non-A&P Stores: Maximum Discount From List Price	A&P Stores: Private Label Price	A&P Stores: Discount From List Price	Percent Overcharge
11/65–1/66	$0.46	$0.3266	29.0%	$0.2834	38.4%	15.2%
1/66–2/66	.46	.3220	30.0%	.2834	38.4%	13.6%
2/66–5/66	.48	.3360	30.0%	.2964	38.2%	13.4%
5/66–8/66	.49	.3430	30.0%	.2964	39.5%	15.7%
8/66–9/66	.51	.3570	30.0%	.3086	39.5%	15.7%
9/66–10/66	.53	.3710	30.0%	.3224	39.2%	15.1%
10/66–11/66	.53	.3710	30.0%	.3244	38.8%	14.4%
11/66–3/67	.53	.3710	30.0%	.3224	39.2%	15.1%
3/67–4/67	.52	.3640	30.0%	.3086	40.7%	18.0%
4/67–5/67	.52	.3640	30.0%	.3126	39.9%	16.4%
5/67	.54	.3780	30.0%	.3213	40.5%	17.7%

Date	Borden List Price	Non-A&P Stores: Minimum Price	Non-A&P Stores: Maximum Discount From List Price	A&P Stores: Private Label Price	A&P Stores: Discount From List Price	Percent Overcharge
5/67–9/67	$0.54	$0.3780	30.0%	$0.3244	39.9%	16.5%
9/67–3/68	.56	.3920	30.0%	.3374	39.8%	16.2%
3/68	.56	.3920	30.0%	.3000	46.4%	30.7%
3/68–5/68	.56	.3920	30.0%	.3374	39.8%	16.2%
5/68–7/68	.58	.4060	30.0%	.3472	40.1%	16.9%
7/68–12/68	.59	.4130	30.0%	.3538	40.0%	16.7%

Final Order

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
Stephen Nye

Docket No. 8866

In the Matter of

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
a corporation, and
BORDEN, INC., a corporation.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of The Great Atlantic & Pacific Tea Company, Inc. (hereinafter "A&P") from that portion of the initial decision dealing with Counts I and II, and upon the appeal of complaint counsel from that portion of the initial decision concerning Count III; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission for reasons stated in the accompanying opinion, having granted the appeal of A&P concerning Count I but otherwise denying the appeals of A&P and complaint counsel; accordingly

IT IS ORDERED that, except to the extent that it is inconsistent with the Commission's opinion, the initial decision

of the Administrative Law Judge be, and it hereby is, adopted together with the opinion accompanying this order as the Commission's final findings of fact and conclusions of law in this matter; and

IT IS FURTHER ORDERED that the following order be, and it hereby is, entered:

ORDER

IT IS ORDERED that A&P, a corporation, and its officers, representatives, agents, and employees, directly or through the use of any other device in connection with the offering to purchase or purchase of milk and other dairy products in commerce, as "commerce" is defined in the Robinson-Patman Act, for resale in outlets operated by A&P, do forthwith cease and desist from directly or indirectly inducing, receiving, or accepting from any seller a net price that A&P knows or has reason to know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers with whom A&P is competing—provided, however, that this prohibition shall not apply if A&P did not know and had no reason to know that the price difference in its favor did not make due allowance for cost differences resulting from differing methods or quantities in which such products are sold or delivered to such purchasers, or if A&P can show that said price was granted to it by the supplier to meet a competitor's equally low price, which price A&P reasonably believed to be lawful. For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts and other terms and conditions of sale.

IT IS FURTHER ORDERED that A&P shall forthwith distribute a copy of this order to its operating divisions and to its suppliers of milk and other dairy products.

Final Order

IT IS FURTHER ORDERED that A&P notify the Commission at least thirty days prior to any proposed change in A&P's structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation, which may affect compliance obligations arising under this order.

IT IS FURTHER ORDERED that A&P shall, within sixty (60) days after the effective date of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

By the Commission. Not having participated in the oral argument in this matter, Chairman Collier did not participate in the resolution of it.

/s/ CHARLES A. TOBIN
Charles A. Tobin,
Secretary.

S E A L

ISSUED: April 29, 1976

Opinion of the Commission

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
Stephen Nye

Docket No. 8866

In the Matter of

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a corporation, and
BORDEN, INC., a corporation.

OPINION OF THE COMMISSION

By NYE, Commissioner:

The complaint in this matter was issued on October 8, 1971.[1] Count I of the complaint charged that The Great Atlantic & Pacific Tea Company, Inc. (hereinafter "A&P")

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[1] For convenience, the following abbreviations are used in this opinion:

I.D.—Initial decision of administrative law judge (Cited by paragraph number).
Tr.—Transcript of testimony (Cited by page number).
CX—Commission exhibit.
RX—Respondent A&P exhibit.

Citations to "Appeal," "Answer," and "Reply" refer to the briefs filed in reference to Counts I and II. Citation to "C.C. Appeal" refers to complaint counsel's appeal brief filed in reference to Count III.

violated Section 5 of the Federal Trade Commission Act (hereinafter the "FTC Act"; 15 U.S.C. §45) as well as the policy of Section 2 of the amended Clayton Act (hereinafter the "Robinson-Patman Act"; 15 U.S.C. §13) by misleading Borden, Inc. (hereinafter "Borden") during negotiations concerning the sale by Borden of milk and other dairy products to A&P. The gravamen of the charge is that A&P failed to inform Borden that Borden's offer, purportedly made to meet a competitive bid received by A&P from another potential supplier, was, in fact, substantially lower than that other bid. Count II charged that A&P violated Section 2(f) of the Robinson-Patman Act (15 U.S.C. §13(f)) by knowingly inducing or receiving discriminations in price from Borden, which discriminations are prohibited by Section 2(a) of that Act. Finally, Count III charged that both A&P and Borden violated Section 5 of the FTC Act by combining to stabilize and to maintain the retail and wholesale prices of milk and other dairy products.

Hearings were held before Administrative Law Judge Harry R. Hinkes, and an initial decision was rendered on September 24, 1975. Judge Hinkes found that A&P had violated the law as charged in Counts I and II but dismissed Count III. Judgment was entered accordingly.

A&P has appealed from the decision, asserting that it did not violate the law as charged in Counts I and II. Complaint counsel has appealed from the decision, arguing that A&P and Borden violated the law as charged in Count III. The Commission heard oral arguments on these appeals on February 25, 1976.

The decision of Judge Hinkes is affirmed as to Counts II and III but reversed as to Count I. Except as qualified or altered by this opinion, we adopt his findings and conclusions. We have substituted a new order.

Opinion of Commission

I. *Factual Background*

Although the record in this case is voluminous, exceeding 20,000 pages, the facts are generally not disputed. All of the violations alleged in this action concern the events surrounding a November 1, 1965 agreement between A&P and Borden under which Borden began supplying private label milk and other dairy products to more than 200 A&P stores in an area that included portions of Illinois and Indiana.

From the record, it appears that in November of 1964, Herschel Smith, A&P's Headquarters Dairy Buyer in New York, advised A&P's Divisional Purchasing Directors of the savings that could be realized by switching from advertised brand to private label milk (Tr. 1350-1351, 1862-1863). Soon thereafter, A&P asked Borden to submit an offer to supply, under private label, certain of A&P's milk and other dairy product requirements in the Chicago area, where Borden had served A&P since the late 1950's. From then until August 13, 1965, A&P and Borden engaged in extensive negotiations which culminated in Borden's offer to grant A&P a discount for switching to private label, provided that A&P would accept limited delivery service (CX 36, 37). Borden claimed that this proposal would reduce A&P's costs by $410,000 per annum compared to what A&P had been paying (CX 37; Tr. 869-871). A&P decided that it was not satisfied and solicited offers from other dairies (Tr. 871; *see* Tr. 1361-1362).

Thereafter, on August 31, 1965, A&P received an offer from Bowman Dairy (CX 50) that was lower than Borden's August 13 offer (*see* CX 65A; A&P's Proposed Findings at 121-122).[2] On or about September 1, 1965, Elmer Schmidt, A&P's Chicago unit buyer, telephoned Gordon Tarr, Borden's Chicago chain store sales manager, and stated, "I have

[2] Contrary to Judge Hinkes' conclusion (I.D. 103, 106-07, 114), we find that the Bowman bid was operative and could be compared to the Borden offer.

a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ball park." (Tr. 873). Although Tarr asked Schmidt for some details, Schmidt said that he could not tell Tarr anything except that a $50,000 improvement in Borden's bid "would not be a drop in the pocket." (Tr. 874-875; *see* CX 53A-B). Contrary to its usual practice, A&P then offered Borden the opportunity to submit another bid (Tr. 1248-1249, 1892-1893).

In consequence, Borden offered to submit a new bid which doubled the savings to A&P from $410,000 to $820,000 (Tr. 227-228). In presenting the offer, Borden emphasized to A&P that Borden needed to keep A&P's business and was making the new offer solely to meet the described competitive bid (Tr. 228). Of course, as noted, Borden knew very little about the competitive bid that it was purporting to meet. Later, Borden submitted a detailed offer (CX 56), which it slightly revised to meet some of A&P's specific demands (CX 62).[3] A&P concluded at the time that Borden's offer was "substantially better" in price[4] than Bowman's (Tr. 1413-1414, 1896-1997; CX 263), and therefore, in October of 1965, A&P accepted it (Tr. 1413; CX 71). The offer was, in fact, much better in price than Bowman's (*see* CX 263B; compare CX 75F-J with CX 50).

A&P's Schmidt requested a letter from Borden which would state that the prices Borden had quoted were proportionately available to competitors of A&P (Tr. 1783, 1786). Borden supplied a letter stating simply that the

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[3] After submission of the bid, Borden excluded glass gallons because A&P stated that "it is not fair to the other bidders." (Tr. 884). In fact, however, the Bowman bid had included a quote on glass gallons (CX 50). A&P also told Borden to "sharpen your pencil a little bit because you are not quite there" meaning, according to Borden's Tarr, that Borden had not yet met the competitive bid (Tr. 885).

[4] A&P was only interested in obtaining the lowest price possible (CX 25B, 263B; Tr. 1400-1401, 1728-1729).

prices were legal and that Borden would defend them (RX 2). In fact, officials of Borden thought that the other bids were based on "anyhow accounting"—including only out-of-pocket or direct costs—and informed A&P of their belief (CX 63; *see* Tr. 213-214, 872-873, 955).

II. *Count I: Failing to Inform*

Count I charged that A&P violated Section 5 of the FTC Act as well as the policy of Section 2 of the Robinson-Patman Act by misleading Borden during negotiations concerning the sale by Borden of milk and other dairy products to A&P. The thrust of the charge is that A&P failed to inform Borden that Borden's offer, made in an attempt to meet a competitive bid received by A&P from another potential supplier, was substantially lower than that of the only other bidder. The count is directed to the question of what must legally be disclosed during contract negotiations.

We briefly state the relevant facts. A&P compared the Bowman bid with Borden's and concluded that Borden's bid was substantially lower. Also, A&P knew that Borden was relying on the meeting competition defense (Tr. 248, 886, 1789, 1792, 1801). Finally, A&P accepted Borden's bid without telling Borden that Borden substantially "beat" Bowman's bid as it clearly had (Tr. 1413; CX 71, 263; *see* Answer at 42). Because A&P did not then inform Borden that the meeting competition defense was unavailable, Judge Hinkes concluded that A&P engaged in an "unfair" practice that violated Section 5 of the FTC Act (I.D. 115, 116).[5]

At the outset we emphasize our belief that Section 5 of the FTC Act can reach actions that violate the policy of the Robinson-Patman Act, *cf. FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972), and, further, that Section 5

[5] Although A&P made certain misrepresentations, *see* note 3, *supra*, such misrepresentations are not relevant to the charge.

should be used to fill the gap in coverage caused by the manner in which Congress added the buyer liability provision contained in Section 2(f) of the Robinson-Patman Act.[6] It is well established that Section 5 can reach buyers who induce violations of the promotional allowance and payment for services provisions of the Robinson-Patman Act. *Fred Meyer, Inc.* v. *FTC,* 359 F.2d 351, 367 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341 (1968); *Giant Food Inc.* v. *FTC,* 307 F.2d 184, 186 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 910 (1963); *Grand Union Co.* v. *FTC,* 300 F.2d 92, 98-99 (2d Cir. 1962). According to the Court in *Grand Union,* the application of Section 5 to buyers who violate specific provisions of the Robinson-Patman Act neither offends Congressional policies nor circumvents the criteria of illegality prescribed by the Robinson-Patman Act. *Id.* at 58. In addition, it is appropriate to use Section 5 to fence in activities which, if permitted to mature, could violate the antitrust laws, including the Robinson-Patman Act, or which otherwise violate the policy of the antitrust laws. *Id.* at 99.

Having recognized this, however, and having measured A&P's conduct against these standards, we do not think that a violation of Section 5 has occurred here. The imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest. As the Court in *Forster Mfg. Co.* v. *FTC,* 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied,* 380 U.S. 906 (1965), stated in describing normal practice:

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[6] "Although Robinson-Patman Act prohibitions were predominantly directed at discriminatory concessions coerced by powerful buyers, the legislative process relegated Section 2(f) to a minor role . . . Section 2(f) first emerged as an amendment offered in debate on the floor of the Senate . . . and represented a last minute afterthought addition." Att'y Gen.'s Nat'l Comm. to Study the Antitrust Laws, Report 193 (1955) (hereinafter "Report").

> The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place.

We recognize the need to curb undue pressure on sellers by powerful buyers such as A&P but do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that such a change would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution. As the Attorney General's National Committee to Study the Antitrust Laws stated, "Legalistic impediments to the normal bargaining process . . . might well deprive the public of gains that under effective competition it has a right to expect." Report, *supra* note 6, at 196. We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid. We do not believe that the failure of buyers to engage in such disclosure should violate the FTC Act.[7] Therefore, Count I should be dismissed.

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[7] We are not concluding that nondisclosure during commercial bargaining never rises to a Section 5 offense. We simply hold that it should not be A&P's responsibility to tell Borden whether a legal defense is available. As discussed at p. 20 n. 19, a seller's good faith meeting competition defense under the Robinson-Patman Act is dependent on some factors that are more readily available to him than to the buyer. For example, to have a meeting competition defense, the seller who has knowingly discriminated in price must show that he acted prudently in surmising whether his bid, in fact, met the equally low price of a competitor. *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945); *Viviano Macaroni Co.* v. *FTC*, 411 F.2d 255, 257-58 (3d Cir. 1969).

III. *Count II: Knowingly Inducing or Receiving Discriminations in Price*

Count II charged that A&P violated Section 2(f) of the Robinson-Patman Act by knowingly inducing or receiving discriminations in the price of milk and other dairy products from Borden, which discriminations are prohibited by Section 2(a) of that Act.[8]

Section 2(f) was enacted to make the prohibitions of price discrimination applicable to buyers. *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 70 (1953). In order to prove a violation of Section 2(f), complaint counsel must not only establish all elements of a Section 2(a) violation, but must also meet special requirements with respect to showing the respondent's "knowledge." Further, the buyer is entitled to raise any defenses that the seller might have raised, specifically those listed in Sections 2(a) and 2(b).[9]

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[8] Section 2(f) reads:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 2(a) reads in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .

[9] Section 2(b) reads in pertinent part:

> . . . nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . . .

A&P admits that the A&P-Borden transaction contained many of the elements of a Section 2(a) offense. It argues, however, that the sales in Illinois were not "in commerce" and that A&P did not receive a discriminatory price that caused competitive injury. In addition, A&P asserts that complaint counsel failed to establish (1) that the price quoted by Borden was not made to meet a competitive bid and was not cost justified and (2) that A&P knew that the price received was not covered by one of those defenses.

We find that A&P has violated Section 2(f) and reject its proffered arguments.

a. *In Commerce*

The Robinson-Patman Act forbids discriminatory pricing arrangements only "where either or any of the purchases involved in such discrimination are in commerce." 15 U.S.C. § 13(a). Therefore to conclude that jurisdiction exists to prosecute A&P, either A&P's or its competitors' purchases must be "in commerce." Recently, the Supreme Court has reiterated its position that at least one of the two transactions which result in the discrimination must cross a state line. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 199-201 (1974). Although A&P does not dispute the finding that the sales to stores in Indiana are "in commerce" for Robinson-Patman Act purposes, A&P argues that the "in commerce" requirement is not met for the Illinois sales.

We reject A&P's claim. In *Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965), the respondent dairy claimed that none of its sales were made in interstate commerce although 20% of its raw milk came from out-of-state. The dairy sold fluid milk processed in its Albuquerque, New Mexico plant to stores in Albuquerque. In holding that the "in commerce" requirement was met, the Court stated:

> [T]he milk passed in a steady flow from the farms in Colorado through the Santa Fe processing plant, where it underwent a rather negligible processing operation, which did not change its character appreciably, to the shelves of retail grocery establishments in Albuquerque . . . [U]nder the stream of commerce doctrine, milk produced in one state and processed and distributed in another state does not lose its interstate character because of standardization, and pasteurization. *Id.* at 677.

Other courts concur with the reasoning and results in *Foremost Dairies*. *E.g., Dean Milk Co.* v. *FTC*, 395 F.2d 696, 714-715 (7th Cir. 1968) (25% of raw milk came from out-of-state).

Most of the raw milk used by Borden's Woodstock, Illinois dairy—approximately 60%—came from Wisconsin (Borden Admission at 8, Sept. 29, 1972). This dairy supplied substantially all of the private label milk sold to A&P (Borden Response at 5, May 3, 1972; A&P Admission at 7, Sept. 27, 1972). Finally, the processing in Woodstock did not interrupt the flow of milk from the farm to A&P's stores (I.D. 17, 168; *see* Borden Additional Admission at 13-14, March 15, 1973; Tr. 107-109). Therefore, the *Foremost Dairies* test is met.

In addition, the negotiations leading up to the agreement between A&P and Borden were multi-state in nature (Tr. 1711) and therefore "in commerce" (I.D. 167). *See Beatrice Foods Co.*, 76 F.T.C. 719, 747 (1969). A&P's Schmidt testified that A&P would not accept an offer to supply only a portion of its stores in Illinois and Indiana (Tr. 1711; *see* Tr. 6126-27).

b. *Discrimination in price and competitive injury*

The Robinson-Patman Act requires both that a discrimination in price take place and that the possible effect of

such discrimination be substantially to lessen competition or to injure, destroy, or prevent competition with a primary or secondary line competitor or with a direct or indirect customer of the buyer.[10] In addition, to conclude that a Section 2(f) violation has taken place, it must be found that the buyer knowingly received the illegal price discrimination. *Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 71. A&P argues that the evidence fails to demonstrate that it was a beneficiary of a price discrimination or that competition was injured. A&P criticizes the price comparisons of complaint counsel, the representativeness of the competitors who were allegedly injured, and the establishment of substantial injury. In addition, A&P states that it did not know that it was a beneficiary of an illegal price discrimination.

We agree with Judge Hinkes' findings (I.D. 62-88; 118-123) that the relevant comparisons demonstrate the existence of discriminations in price. We note that a price comparison does not have to include the full line of dairy products nor A&P's purchases of Borden brand products. We faced and dismissed this same argument in *Beatrice Foods Co.*, 76 F.T.C. 719, 806 (1969), *aff'd sub nom., Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). Specifically, the price of private label milk and other dairy products sold to A&P may validly be compared with Borden's sales of such items to other groceries to ascertain whether discrimination took place. The *Kroger* Court stressed "the competitive advantage which results when disadvantaged competitors are denied a [private] label which the favored buyer receives." 438 F.2d at 1379. In addition, although there were differences in the way A&P and its competitors were served, the distinctions were

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[10] Although one could conceivably argue that injury at the primary or seller level took place, complaint counsel limited their case to proving secondary or buyer level discrimination.

often minimal and, in any event, are more properly considered in connection with the cost justification defense.

We are unclear as to what A&P means when it argues that the sample of stores must be "representative." As the Court in *Kroger Co.* v. *FTC, id.* at 1378, stated, "[E]vidence of discrimination in only one area is sufficient to meet the requirements of the Act." *Accord, Foremost Dairies, Inc.* v. *FTC, supra,* 348 F.2d at 681. "[U]nless minuscule, the portion of the market that might be affected by the charging of these discriminatory prices is immaterial." *National Dairy Products Corp.* v. *FTC,* 395 F.2d 517, 522-23 (7th Cir.), *cert. denied,* 393 U.S. 977 (1968). The area studies[11] presented by complaint counsel are quite detailed and are, in fact, representative of the areas allegedly affected (*See, e.g.,* CX 182; RX 234 at 19). If anything, complaint counsel has exceeded any requirement of "representativeness" (*See* I.D. 121).

In addition, complaint counsel has shown that competitive injury occurred, regardless of whether we applied the reasonably "possible" test, *e.g., FTC* v. *Morton Salt Co.,* 334 U.S. 37, 46 (1948); *Purolator Products, Inc.* v. *FTC,* 352 F.2d 874, 881 (7th Cir. 1965), *cert. denied,* 389 U.S. 1045 (1968), or the "probable" test, *Foremost Dairies, Inc.* v. *FTC, supra,* 348 F.2d at 680.[12] The Robinson-Patman Act does not require proof that injury actually occurred but merely a showing that competition *may* be reduced because discrimination took place. *National Dairy Products Corp.* v. *FTC, supra,* 395 F.2d at 521. "The statute is designed to reach such discriminations 'in their incipiency' before the harm to competition is effected." *FTC* v. *Morton Salt Co., supra,* 334 U.S. at 46 n. 14.

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[11] These include Chicago and its suburbs, Gary-Hammond, and Valparaiso, Indiana.

[12] As the court in *Foremost Dairies* noted, 348 F.2d at 680 n. 11, "[T]he distinction between the two standards may be more apparent than real."

We note that many courts have discussed the significance of differences in the prices charged to competing businesses in industries such as retail food, which are characterized by keen competition and low profit margins. *E.g., Kroger Co.* v. *FTC, supra,* 438 F.2d at 1379; *Fred Meyer, Inc.* v. *FTC, supra,* 359 F.2d at 367; *see United Biscuit Co. of America* v. *FTC,* 350 F.2d 615, 621-22 (7th Cir. 1965), *cert. denied,* 383 U.S. 926 (1966). Milk is one of the most important commodities carried in retail grocery stores (A&P Admission at 3, March 1, 1973). Therefore, discrimination in favor of A&P amounting to as much as 22.5% (Model Food Center, CX 182, 187, 191A)[13] in this extremely competitive, price sensitive industry compel an inference of adverse competitive effect. *See, e.g., FTC* v. *Morton Salt Co., supra,* 334 U.S. at 46-47; *Kroger Co.* v. *FTC, supra,* 438 F.2d at 1379.[14] That A&P did not pass the discount on as a lower price to consumers does not rebut the inference *Foremost Dairies Inc.* v. *FTC, supra,* 348 F.2d at 680. For example, in receiving the price discount, A&P enlarged its profit margin (*See* CX 185, 255; Tr. 2059-2060)[15] and thereby obtained a material capital advantage in this highly competitive field. *See Kroger Co.* v. *FTC, supra,* 438 F.2d at 1378; *Foremost Dairies, Inc.* v. *FTC, supra,* 348 F.2d at 680.

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[13] The *Kroger* Court, 438 F.2d at 1379 n. 4, listed examples of discounts in secondary line cases. The discounts to A&P are in line with those found to cause injury in other cases. For example, the Court in *Foremost Dairies, Inc.* v. *FTC, supra,* 348 F.2d at 675, found competitive injury where discounts were as low as 5%.

[14] The Court in *Fowler Mfg. Co.* v. *Gorlick,* 415 F.2d 1248, 1252 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970), a private Robinson-Patman Act action, stated that a price differential alone establishes competitive injury. There is no need to prove a lessening of competition to obtain damages.

[15] The profit margins of the unfavored competitors were very low, ranging from less than 1% to 5% (*See* Appendix 4 [in camera]; CX 184, 189, 192, 199A, 199J-Z, 201, 203 [all in camera]; I.D. 88).

Finally, we address the issue of knowledge. A&P admitted that milk is one of the most important commodities in groceries and that milk is a staple purchased more frequently by consumers than other products (A&P Admission at 3, March 1, 1973). It is acknowledged that selling milk at a higher price than one's competitors will cause some consumers to switch stores. A&P also admitted that profit margins in the retail grocery business are very low (A&P Admission at 4, March 1, 1973). Therefore, A&P by virtue of its trade experience or simply common sense, knew or should have known that it was a beneficiary of a price discrimination having the requisite harmful competitive effects (*see* I.D. 86-88, 97). Accordingly, we reject A&P's arguments.

c. *Meeting Competition*

A seller who has discriminated in price is guiltless under the Robinson-Patman Act if the lower price was offered in good faith to meet an equally low price of a competitor. 15 U.S.C. § 13(b). The Supreme Court has stated that the buyer is not liable under Section 2(f) if the lower price he induces is within the meeting competition defense or if the buyer is unaware that the price cannot be protected by that defense. *Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 74. The Court in *Kroger Co.* v. *FTC, supra,* 438 F.2d at 1377, noted that when a buyer is charged with violating Section 2(f), the price he induces must come within the meeting competition defense not only from the seller's point of view but also from the buyer's. This is consistent with the Supreme Court's statement concerning the burden of going forward in a Section 2(f) case:

> Our view that § 2(b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the

> seller's price was made to meet a competing seller's offer to a buyer charged under § 2(f) might be available to a buyer more readily even than to a seller. *Automatic Canteen* v. *FTC, supra,* 346 U.S. at 79 n. 23.

Specifically, proof that the seller did not act in good faith is unnecessary to a finding that a buyer cannot assert the meeting competition defense.

In its reply brief, A&P argues that its contemporaneous comparison of the Bowman and the last Borden bid is not relevant (Reply at 35). We disagree. The comparisons demonstrate whether A&P acted in good faith. For example, if the Borden bid *"beat"* the Bowman bid yet A&P contemporaneously reasonably believed that it only *met* the bid, we believe A&P (as well as Borden, if Borden prudently reached the same conclusion) could assert the meeting competition defense. *See FTC* v. *A.E. Staley Mfg. Co.,* 324 U.S. 746, 759-60 (1945).[16] However, we conclude that A&P contemporaneously concluded that Borden's bid was "substantially better" than Bowman's (Tr. 1413-1414, 1896-1897; CX 263), and A&P, therefore, cannot assert the seller's meeting competition defense.

We assume, *arguendo,* that A&P can assert the defense if the Borden bid did, in fact, happen only to meet the Bowman bid. However, while we believe that the Bowman bid was comparable and operative,[17] we conclude that the Borden bid was substantially better than the Bowman bid. Specifically, we find that prior to adjusting the Bowman bid to make it reflect such items as A&P's true volume requirements and delivery requirements, Borden's bid substantially beat Bowman's (*See* CX 263B; Compare CX 75

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[16] A&P argued that in this case, it contemporaneously believed that Borden's bid beat Bowman's but after "properly" comparing the bids, Bowman's bid, in fact, beat Borden's (Appeal at 31-33).

[17] Specifically, we reverse Judge Hinkes' conclusion to the contrary (*See* FF 103, 106-07, 114).

F-J with CX 50). In addition, after adjusting the Bowman bid to make it responsive to A&P's true situation, Borden's bid beats Bowman's by an even greater amount. Bowman would not be able to give A&P such a low price because A&P's volume was less than the $1 million per month stipulated in the Bowman offer (*See* citations in I.D. 106) and because Bowman would have to increase the days of delivery in the Gary-Hammond area (*See* citations in I.D. 107).[18]

Finally, A&P argues that because Borden has not been found in violation of Section 2(a), A&P cannot be charged under Section 2(f). In other words, A&P asserts that Borden must be convicted of a Section 2(a) violation prior to or at the same time as A&P is found in violation of Section 2(f). In developing this argument, A&P claims that complaint counsel's case against A&P is premised on Borden's having a valid meeting competition defense, and that therefore, Borden would be absolved from any Section 2(a) charge. We reject the argument.

The Commission alone establishes the enforcement policy which will best accomplish the ends contemplated by Congress. *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *see Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155, 1160 (7th Cir. 1970). In deciding to issue a complaint against A&P charging a violation of Section 2(f), the Commission concluded that A&P's conduct was egregious enough to warrant such action. It did not follow that the Commission condones Borden's behavior. In addition, as complaint counsel notes (Answer at 50), A&P was the "principal malefactor" in the negotiations with Borden.

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[18] The difference in stipulated butterfat content would not greatly change the difference in prices. Contrary to A&P's study, Borden's butterfat level was probably about 3.45% (Tr. 5513), and the Bowman bid may not have called for 3.5% (Tr. 5450-5453, 5461, 6187-6188; *see* I.D. 129).

It placed the pressure on Borden, not *vice versa*. Although the Commission decided not to issue a complaint against Borden for violation of Section 2(a), the Commission has not concluded that Borden would have a valid meeting competition defense to such a charge.[19]

Furthermore, even though a seller has a defense to a Robinson-Patman Act charge, a buyer can still violate Section 2(f). The court in *Kroger Co.* v. *FTC, supra,* found that the buyer lied to the seller about the details of a competing bid, 438 F.2d at 1375-1376, and that the seller had no way of knowing that the buyer had lied. Therefore, in submitting the second bid, the seller had a meeting competition defense within the meaning of Section 2(b). However, this defense did not exonerate the buyer who knew that the bid was, in fact, not within the defense. "To hold otherwise . . . would put a premium on the buyer's artifice and cunning in inducing discriminatory prices [and] would violate the purposes of the Act, and frustrate the intent of the Congress." *Id.* at 1377.

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[19] Judge Hinkes did not reach the question of whether Borden had a meeting competition defense (*See* I.D. 166). We believe that it is very probable that Borden did *not* have such a defense. To have a meeting competition defense, the record must demonstrate the existence of facts which would lead a reasonable and prudent person to conclude that the lower price would, in fact, meet the competitor's price. *FTC* v. *A. E. Staley Mfg. Co., supra,* 324 U.S. at 759-760; *Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 534 (5th Cir. 1973). As noted Borden had serious doubts concerning whether the competing bid was legal. Specifically, it believed that the other bid only considered direct costs (Tr. 237-239, 376-77, 878, 961-62). It should have asked A&P for more information about the competing bid. By not making the request, it was not acting prudently. *See Standard Oil Co.* v. *Brown,* 238 F.2d 54, 58 (5th Cir. 1956); F. Rowe, Price Discrimination under the Robinson-Patman Act 226 (1962). As the record clearly indicates, A&P had knowledge of Borden's belief that other dairies might submit bids that did not include all costs (Tr. 213-214, 872-873, 955).

d. *Cost Justification*

A seller who charges different prices is exonerated if the differences are justified by a savings in cost. 15 U.S.C. § 13(a). As in the case of meeting competition, a buyer is not liable under Section 2(f) if the lower price he induces is within the cost justification defense or if the buyer is unaware that the price is not protected by that defense.

The parties and Judge Hinkes disagree as to who has the burden of proof in demonstrating whether the cost justification defense is available (I.D. 134; Answer at 66-68; Reply at 48-49). A&P and Judge Hinkes are mistaken in concluding that the *Automatic Canteen* case dealt with the burden of proof issue. Rather, the Supreme Court stated twice that it was deciding only who had the burden of first coming forward with probative evidence. 346 U.S. at 65, 82. In promulgating its rule of "fairness and convenience," *id.* at 78, the Court determined that the Commission did not satisfy this burden by showing only that the buyer had knowledge of a price differential.[20] Rather, the Commission must present evidence to demonstrate that the buyer was reasonably aware that the price differential could not be cost justified. *Id.* at 78-80.

The Court believed, however, that the burden of showing this knowledge "should not be difficult." *Id.* at 79. As an example of the evidence which would satisfy this burden in a situation where methods of services and quantities delivered differ, the Court held that the Commission "must only show" that the differences could not give rise to sufficient cost savings and that the buyer, knowing that these were the only differences, should have known that the differences were not cost justified. *Id.* at 80. The

[20] In *Automatic Canteen*, the Commission only established that the buyer had obtained prices as much as one-third below its competitors.

Court emphasized that it would not attempt to illustrate "what other circumstances can be shown to indicate knowledge on the buyer's part that the prices cannot be justified," *id.* at 80, concluding that the Commission should do this.[21] *Id.* at 80-81; *accord, Suburban Propane Gas Corp.*, 73 F.T.C. 1269, 1272-1274 (1968) (interlocutory order); 16D J. von Kalinowski, Business Organizations: Antitrust Laws and Trade Regulation §§ 36.05[2]-36.05[3] (1971).

We have described on several occasions how complaint counsel can successfully meet the burden of going forward with the evidence where a favored buyer purchases in quantities or under methods differing from those accorded to disfavored buyers:

> [I]f complaint counsel show such facts and circumstances as would have given the buyer reason to believe, based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him, they would have met their initial burden. *Beatrice Foods Co., supra*, 76 F.T.C. at 820, *quoting Suburban Propane Gas Corp.*, 71 F.T.C. 1695, 1699 n. 2 (1967) (interlocutory order).

We reiterate what we said in *Suburban Propane Gas Corp., supra*, 73 F.T.C. at 1273—the burden of establishing a *prima facie* case or first going forward with the evidence may be satisfied without introducing a formal cost study showing that the lower prices were not, in fact, cost justified. The Court of Appeals for the Sixth Circuit

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[21] The Commission has frequently decided what circumstances demonstrate that a buyer had the requisite knowledge. *E.g., Mid-South Distributors* v. *FTC*, 287 F.2d 512, 518-19 n. 15 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961).

has affirmed our use of this rule. *Kroger Co.* v. *FTC, supra,* 438 F.2d at 1378.

Once complaint counsel has satisfied their initial burden, the buyer must demonstrate that it did not know or could not reasonably have known that the price differential was not cost justified. If it fails to prove lack of knowledge, it must show that the price differential was, in fact, cost justified. *See Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 74. Therefore, if the buyer establishes that it neither had nor should be charged with such knowledge, the buyer does not have to submit any cost justification study. However, if the buyer cannot establish the requisite lack of knowledge, it must submit a cost study if it wishes to prevail, which study generally will be held to the same standard as are cost studies offered by sellers. In other words, it is possible for the buyer to be unable to respond adequately to complaint counsel's evidence demonstrating knowledge yet be able to demonstrate that, in fact, the price differential was cost justified. Unlike the meeting competition defense, one does not need to demonstrate good faith in proving cost justification. Therefore, it is completely permissible to receive in evidence cost studies prepared after the alleged discriminatory sale and only for purposes of litigation. Rowe, *Cost Justification of Price Differentials Under the Robinson-Patman Act,* 59 Colum. L. Rev. 584, 610 (1959).

Finally, if the buyer satisfies the burden of meeting complaint counsel's *prima facie* case, then complaint counsel must rebut the buyer's evidence. The buyer may then introduce other evidence responding to complaint counsel. Although the burden of going forward may shift back and forth during the hearing and is frequently not so easily segregated, the burden of persuasion as to the issue of whether the buyer had the requisite knowledge that the cost justification defense is unavailable rests with com-

plaint counsel while the burden of persuasion as to the issue of whether the prices are, in fact, cost justified rests with the buyer. *Suburban Propane Gas Corp., supra,* 73 F.T.C. at 1274-1275; *see Beatrice Foods Co., supra,* 76 F.T.C. at 820.

We believe that the evidence submitted by complaint counsel in this case well exceeded its initial burden. Many competitors were charged a much higher price than A&P for Borden's milk products even though they bought in greater quantities than the individual A&P stores with which they were competing (*E.g.,* Burger's: CX 182, 187, 188A, RX 234, p. 19; Tr. 2270, 2381, 2385). Although many of these stores received more service than A&P, the service savings to Borden could not in any way justify the price differentials (*See* I.D. 109-110). In addition, even those companies that received limited service paid a higher price than A&P (*See* Complaint Counsel's Proposed Findings, Vol. 1 at 150-151), a price differential that was not justified by the saving of such costs as advertising (*See* CX 54; Tr. 3387, 3430, 6136). A&P knew about the differentials, since it was being charged the "regular" price for branded items (*See* CX 75, 255; RX 66). This evidence in itself would probably be sufficient to shift the burden of going forward. However, complaint counsel introduced much more evidence to demonstrate that A&P knew or should have known that the prices it received were not cost justified.

First, Borden stated explicitly that its final offer could *only* be justified on the basis of meeting competition, and A&P accepted the offer on this representation (Tr. 248, 886, 1789, 1792).[22] As the Supreme Court stated in *Auto-*

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[22] When Ralph Minkler, President of Borden's Central District, presented Borden's final bid to A&P's Schmidt, he stated: "This price is given to you by us on the feeling and belief that we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis." (Tr. 248).

matic Canteen Co. v. *FTC, supra,* 346 at U.S. 73: "§ 2(f) was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer." *Accord,* 80 Cong. Rec. 9419 (1936) (Statement of Congressman Utterback in presenting conference report to House); Report, *supra* note 6, at 193. The Borden statement put A&P on notice that it was likely that Borden did not have a cost justification defense. *Cf. Beatrice Foods Co., supra,* 76 F.T.C. at 821 (Because seller was told by two other dairies that price might not be cost justified, he had notice of possible cost justification problems).

Second, although A&P requested the customary assurances from Borden that Borden's discounts were available to others on proportionately equal terms (Tr. 1783, 1786-1788, 1978-1979), A&P did not receive them. In fact, Borden specifically refused to comply, writing instead, "our prices are proper under applicable law and we are prepared to defend these prices." (CX 263H; *see* Tr. 1406, 1428, 1438-1440).[23]

Third, Borden provided A&P with detailed cost data during the course of the negotiations, data which showed that Borden would be either losing money or making a minimal profit (CX 23, 24, 25A, 26; Tr. 201-205, 1866-1869). Although the data may not be completely accurate, it demonstrates that A&P at least had knowledge that the discounts could drastically affect Borden's profits, and therefore, A&P should have inquired whether the prices

[23] Hershel Smith, A&P's Headquarter's Dairy Buyer, said that he received oral assurances from Harry Archer, Borden's Executive Vice President in New York, that this was a letter of availability (Tr. 1407). However, Archer denied having such a conversation (Tr. 1246-1247). After viewing both witnesses and examining all of the evidence, Judge Hinkes did not credit Smith's testimony (I.D. 96).

were available to others. *See Fred Meyer, Inc.* v. *FTC, supra*, 359 F.2d at 365-67.[24] Of course, if the A&P-Borden contract was profitable for Borden before the switch to limited service and Borden would lose money after the change, then A&P should have doubted whether the new prices could be cost justified (*See* I.D. 91-93).[25]

Fourth, A&P's trade experience should have given it reason to know that Borden's private label prices were not cost justified. *See Automatic Canteen Co.* v. *FTC, supra*, 346 U.S. at 79-80 (Trade experience "can afford a sufficient degree of knowledge to provide a basis for prosecution."); *Kroger Co.* v. *FTC, supra*, 438 F.2d at 1378. As Judge Hinkes concluded (I.D. 97, 98, 127), A&P was familiar with the dairy industry generally and with the Chicago area specifically. Also, A&P knew that Borden's private label price was substantially lower than its branded label price because A&P bought both types of milk from Borden (*See* CX 75, 255; RX 66). Therefore, A&P should have known that its competitors, some of whom received limited service, were paying much more than A&P for the same product.[26]

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[24] Citing *Automatic Canteen Co.* v. *FTC's* language about puffing in a bargaining situation, 346 U.S. at 80 n. 24, A&P argues that Borden might very well have submitted a purposely inaccurate bid (Appeal at 45-47). At this point, A&P's evaluation of Joseph Malone, the Vice President of Governmental Controls and formerly the Comptroller of Borden's Central District and the employee who prepared the data, is relevant: A&P believed that Malone was "honest and forthright." (Tr. 1843). In addition, if we disregarded all studies in which a self-interest motive is present, then, of course, we must dismiss the studies prepared for A&P's cost justification defense.

[25] As noted at pages 23-24, we do not believe that complaint counsel has the burden of introducing a formal study demonstrating that the price differential is not cost justified and do not consider these calculations such a study.

[26] Of course, labels do not differentiate products for purposes of determining "like grade and quality." *FTC* v. *Borden Co.*, 383

Finally, A&P's conduct after the private label agreement was consummated convinces us that A&P knew or had reason to know that any differences in service were not cost justified. First, in mid-November of 1965, Borden decreased the price A&P paid for Borden label products but at a much lower discount than it granted A&P on private label products (RX 66). Except for the small amount devoted to advertising, there was no difference in the cost to Borden of private and branded products. Therefore, A&P should have realized that the price was not cost justified (*See* I.D. 99). Second, in May of 1966, A&P accepted an increase on Borden label products which reflected increased container, labor, and social security costs, an increase which Borden apparently charged all of its purchasers. However, A&P at first refused Borden's request that the price of A&P's private label products be raised commensurately (CX 79, 81, 255B; Tr. 1050-1054) and later accepted only a proportionately smaller increase (Tr. 1056-1062; *See* CX 102, 103, 105, 106, 110).[27] Because A&P readily accepted the increases on branded milk, we infer that A&P believed that Borden was selling branded milk to some of A&P's competitors at delivery terms similar to those at which Borden was selling branded and unbranded milk to A&P, and therefore, considering Borden's small advertising expenses, A&P's private label discount was not cost justified. *See Automatic Canteen Co.* v. *FTC*, *supra*, 346 U.S. at 80.

U.S. 637, 640 (1966). The only benefit lost by A&P was advertising, which was a very small expense.

[27] This action is conceivably a second inducement by A&P of discriminatory prices and therefore, a separate and distinct violation of the Robinson-Patman Act (*See* I.D. 57, 58, 89, 101; Complaint Counsel's Proposed Findings, Vol. 1 at 119). Because we have found that A&P received an illegal price preference prior to these increases, we do not specifically address this claim.

In conclusion, viewing all of these facts together, we find that complaint counsel fully established a *prima facie* case that A&P knew or should have known that the prices Borden charged it for private label products was not cost justified.[28] The burden then shifted to A&P to demonstrate that it did not have knowledge that the prices it received were not cost justified or, failing to establish that, that the prices were, in fact, cost justified.

We do not find persuasive A&P's assertions that it did not know nor should have known that the prices it received were not cost justified. Its statements concerning the meeting competition language in the negotiations and the "legal letter" are not convincing (*See* A&P's Proposed Findings at 76-86). In a post-hoc analysis of the cost data that Borden supplied it, A&P argued that the Borden study was not completely reliable (Appeal at 45-47). However, A&P did not show whether it had contemporaneous criticisms of the quality of the data nor whether it communicated any of its criticisms, perhaps in the form of additional inquiries, to Borden. As noted at page 27, this data does not have to be completely accurate but is useful in proving that A&P was on notice that the new contract could be unprofitable to Borden. Finally, A&P's post-agreement behavior is relevant to show what knowledge A&P had at the time the agreement was entered.

A&P introduced evidence which showed that A&P's Smith used a "2-2-2 formula" to evaluate the reasonableness of a bid. The formula states that a dairy can profitably sell milk for approximately six cents more per quart

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[28] We are not convinced that because Borden spread the savings over eleven rather than thirteen items, A&P was on notice that the bid was not cost justified. Although generally we agree that "the same cost savings applicable to different products with different volumes would not likely be related to . . . cost savings" (I.D. 90), it is at least conceivable that the $820,000 savings represented the amount Borden would save by switching to limited delivery service.

than the dairy's cost for raw milk.[29] Although we agree that this formula is relevant in considering whether A&P had knowledge, it does not rebut complaint counsel's *prima facie* case. As noted, the formula was simply a reference point from which to estimate costs (Tr. 6399). It was developed from A&P's experience in negotiating for its private label supply of milk in New York and Massachusetts. Because the costs and conditions in the Chicago area were different (*E.g.*, In-plant wages: CX 25C, 26), it should have been adjusted. In fact, as A&P admits, the formula was never used to determine the exact measure of a dairy's cost but only to serve as a "workable rule of thumb." (Appeal at 49). Reliance on such a formula would be very irrational in light of all the other evidence (*See* I.D. 98).[30]

Since A&P did not present enough evidence on the issue of knowledge to shift the burden back to complaint counsel, it had to submit a cost justification study if it wished to prevail. The studies entered by A&P on the record (RX 233, 234) were prepared specifically for purposes of this litigation.[31]

We affirm Judge Hinkes' findings (I.D. 136-165) that A&P's cost justification studies "are so defective and inadequate as to furnish no evidentiary basis" to justify the price differential that A&P received for private label prod-

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[29] Two cents each are allocated for cartons, plant costs and profits, and delivery costs (Tr. 6399).

[30] A&P's other arguments—for example, that A&P could get better prices on private labels in other parts of the country (Tr. 7326)—also do not adequately rebut complaint counsel's strong showing.

[31] Because we do not find the studies sufficiently reliable, we did not decide whether Borden's internal cost calculations (CX 54, 87, 206) are accurate. If A&P's studies adequately showed some type of cost justification, the Borden studies would have been considered as complaint counsel's rebuttal. Accordingly, we did not ascertain whether the A&P study (RX 232) which was offered to rebut Borden's internal cost calculations is accurate.

ucts on the basis of Borden's cost savings (I.D. 165). Because the studies are so flawed, we would not find them persuasive under any reasonable standard. However, as we have stated, generally a buyer's cost justification study should meet the same standard that a seller's must. On the other hand, a buyer need not submit any study if complaint counsel fail to prove that the buyer knew or could be charged with knowledge that the prices were not cost justified. *See Automatic Canteen Co.* v. *FTC*, *supra*, 346 U.S. at 74.[32] We note in passing that we would be willing to lower the standard if it was demonstrated that the buyer could not obtain the necessary records from the seller to undertake the study. *See id.* at 79, 81. A&P alleges that hostility existed between Borden and itself (Appeal at 15-16; A&P's Proposed Findings at 8-9) but does not confirm that these "inherent conflicts" prevented it from obtaining records from Borden. In fact, the record shows that A&P was able to get the documents it needed.

A&P asserts that "the most egregious example" of the failure by Judge Hinkes to follow a liberal approach to its cost study is his rejection of the original derivation of Borden's delivery costs (Appeal at 53). The calculations, based on "time standards" developed in 1949 from studies made of Bowman Dairy deliveries in Chicago and confirmed by additional work in the 1950's and 1960's, are summary in nature. Also, the underlying data necessary to conduct an effective examination of their reliability were destroyed (Order, Sept. 16, 1974). In addition, Robert Havemeyer, the author of the A&P studies, did not participate in the collection of the data nor in the preparation of the standards (*Id.* at 2). Therefore, he could not be effectively cross-examined on the validity of the

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[32] Of course, if the seller is joined in the Robinson-Patman action and relies on the cost justification defense, he will submit the cost justification study.

underlying data.[33] For these, as well as other reasons, Judge Hinkes properly refused to admit the calculations. *Id.* This is not a matter of preferring one method of calculation over another. Judge Hinkes simply could not determine whether the calculations were even arguably reliable. *Cf. FTC* v. *Standard Motor Products, Inc.*, 371 F.2d 613, 622 (2d Cir. 1967).

A&P's arguments concerning the relevance of the Wisconsin research (RX 9, 11) are adequately dealt with by Judge Hinkes (*See* I.D. 139-142). We note, however, our disagreement with the Judge's general rejection of standardized costs (I.D. 143). If it could be proven that standardized costs are reflective of actual costs—a showing not made in this case—then we would be willing to accept standardized costs as a substitute for actual costs.[34]

The studies are unpersuasive for numerous other reasons. For example, the studies did not consider the fact that a portion of Borden's expenses were incurred only in connection with its dealings with A&P (*See* citations in I.D. 157-160). Without a study of these costs, one cannot ascertain the true cost differences between the costs of handling the A&P account and the costs of handling the accounts of other purchasers (*See* Tr. 9422). *See* Rowe, *supra* note 19, at 287 ("It would be hard to defend a cost study which lacked internal consistency by resort to analytic reasoning with respect to one factor that would vitiate another."). Furthermore, the studies do not allo-

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[33] Havemeyer frequently was not helpful in describing the relationship of underlying data to the summaries. For example, when asked which study was not included in making certain observations, he stated, "I cannot tell you because the working papers . . . are no longer available." (Tr. 9130-9131).

[34] Even if the time calculations were acceptable, we would not find Havemeyer's calculations of delivery costs reliable. Some of the problems with the Havemeyer analysis are described in the initial decision (I.D. 144).

cate costs according to the manner in which they were incurred (*See* citations in Complaint Counsel's Proposed Findings, Vol. II at 295-296), do not allocate overhead expenses according to accepted accounting principles (*Id.* at 296-297; *see FTC* v. *Standard Motor Products, Inc., supra*, 371 F.2d at 622), and inaccurately assign costs to certain customers (*E.g.*, citations in I.D. 162).

But the most important task in evaluating the studies lies in ascertaining the credibility, intelligence, and experience of Mr. Havemeyer. Judge Hinkes found (I.D. 137) that Havemeyer did not base his studies on any personal knowledge of Borden's operations. Because Havemeyer was unfamiliar with Borden's operations and activities, he did not consider many relevant factors (*See* discussion in I.D. 146-152). In addition, Havemeyer did not review all of the available evidence to determine the completeness of his studies. For example, when asked if he made any check to determine if all loading expenses were included on a certain ledger, he stated he did not but added that his staff had made "some type of check." When asked about the type of check, he stated that he could not be specific (Tr. 7520). His experience with Robinson-Patman cost studies was limited to preparation of a study for one other litigated case, *United States* v. *Borden Co.*, 370 U.S. 460 (1962), in which the study was rejected by the Court because Havemeyer failed to classify stores adequately. *Id.* at 470-471.

A&P asserts that Judge Hinkes erred in finding that the studies failed to classify customers properly (Appeal at 55-56; *see* I.D. 154-155). The studies do, in fact, differentiate stores on the basis of "limited service" and "full service." However, it is clear that stores differ in terms of all types of expenses, including delivery expense, clerical expense, product waste, selling expense, credit loss, merchandising expense, and overhead. More important, the stores also differ in volume of purchases.

The Supreme Court in *United States* v. *Borden Co., supra,* criticized requiring cost justification on a customer by customer basis. 370 U.S. at 468. It tried to strike a balance which would permit group averaging where the group members were sufficiently alike especially "on the essential point or points which determine the costs considered" to make the averaging a reasonable indication of the cost of dealing with individual members. *Id.* at 469. We believe that the A&P classification makes some sense and could meet the *Borden* test although we are troubled by the volume differences between stores. *See Foremost Dairies, Inc.,* 62 F.T.C. 1344, 1361-1362 (1963), *aff'd, supra.* However, we do not have to decide this issue because the studies are so fundamentally flawed.[35]

For all of these reasons, we find that the cost justification studies are inadequate to shift the burden back to complaint counsel. Therefore, we find that A&P did not prove that the differential it received was cost justified.

IV. *Count III: Combining To Stabilize Prices*

Count III charged that A&P and Borden entered into a combination having the tendency or effect of stabilizing and maintaining retail and wholesale prices for milk and

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[35] Similarly, we do not have to reach the question whether the studies are invalid because they determine cost for A&P stores on an average basis and compare this average with the specific costs of serving allegedly injured competitors (Appeal at 56-57; *see* I.D. 156). We note, however, that such a procedure could hide large discrepancies in size among A&P stores. And size, of course, is often related to cost differences. *See National Dairy Products Corp.* v. *FTC, supra,* 395 F.2d at 525-26, *aff'g* 70 F.T.C. 79, 193-196, 207 (1963). Finally, we also do not have to address complaint counsel's assertions that the studies should cover the entire discrimination period (*See* Complaint Counsel's Proposed Findings, Vol. II at 300-305). We think, however, that such a requirement is unduly burdensome.

other dairy products.[36] Judge Hinkes dismissed the count. Complaint counsel argue that Judge Hinkes applied the wrong standard of proof—that he did not view the evidence in the case *in toto* but looked at each part separately. According to complaint counsel (C.C. Appeal at 3-4, 7-8), Judge Hinkes required that each element of the conduct of the parties be sufficient to demonstrate the existence of an unlawful combination, contrary to the teaching of such cases as *C-O-Two Fire Equip. Co.* v. *United States*, 197 F.2d 489, 494 (9th Cir. 1952).

Complaint counsel emphasize that the communications between A&P and Borden and the "needs" of these parties show that a combination took place (*E.g.*, C.C. Appeal at 9, 18).[37] Concerning the communications, we agree with Judge Hinkes (I.D. 199) that the record contains no evidence suggesting that Borden and A&P discussed the price A&P would charge retail customers or the price Borden would charge A&P's competitors, except to note that a price differential at the retail level between branded and unbranded products might create problems. Viewed together as well as separately, we do not find that the statements relied on by complaint counsel show that a combi-

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[36] Although the count charges that the combination had a tendency to stabilize prices at both the retail and wholesale level, the thrust of complaint counsel's case is directed to the retail level aspect (*See* I.D. 179-187).

[37] Complaint counsel presented other arguments which we find unconvincing. For example, they note that the $820,000 savings was not made on any straight discount basis but spread by Borden over the 11 different product lines. Thereby Borden could influence A&P's retail price (Tr. 5233-5234). But as A&P's expert economic witness, Dr. Markham, stated (Tr. 7041-42), a distribution of cost savings among the various products was rational and in accordance with customary industry practice. In addition, each item was ordered separately on a demand basis, and therefore, a single price for one year's purchase of all 11 items could not be quoted (*See* I.D. 194).

nation to stabilize price existed.[38] The statements do not in any way convince us that A&P ever gave Borden the assurance that A&P would not create a price differential at the retail level.

We also do not understand why A&P and Borden needed to enter into a combination to stabilize prices. Their pre- and post-agreement conduct show only that they were acting as economically rational businessmen. Although clearly adversaries in their negotiations—A&P wanting the lowest price possible and Borden the highest—both A&P and Borden were strongly motivated by independent causes to maintain existing dairy prices.[39]

A&P hoped that by switching to private label milk, it could obtain lower costs and increase its gross margin (*E.g.*, Tr. 1400-1401). This was its whole purpose in negotiating the private label agreement with Borden, not passing lower costs on to customers to increase volume. We note that throughout the A&P-Borden negotiations, no provision was ever discussed for increases in volume of A&P's previous sales. We infer from this that the parties never contemplated that A&P would use its lower cost to lower price and thereby increase volume. Were A&P to lower its retail price, A&P would not achieve its immediate goal: to maximize profits (*See* Tr. 5230; 7038). Also, A&P feared that if it lowered the retail price of milk, Borden might be forced to give a similar wholesale discount to A&P's competitors. In addition, A&P was aware that the price it obtained from Borden cut Borden's profit margin to a

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[38] These include the "sensitiveness of the market (CX 12A)," the "depressed competitive situation (CX 18P)," and comments at the May 26, 1965, meeting between A&P and Borden (CX 19).

[39] The evidence submitted relating to market structure (*See* C.C. Appeal at 19-23) convinces us that A&P and Borden lacked the ability to stabilize prices (*See* Borden's Answering Brief at 31-37). Therefore, this evidence does not buttress complaint counsel's position that a combination took place.

point at which Borden might be driven out of the market if the prices that Borden charged decreased further.

Borden had recently completed building a large plant in Woodstock, Illinois and was willing to sacrifice some price to increase volume and thereby operate efficiently (Tr. 217, 5230). Especially, Borden needed to keep its major customer, A&P (*See* CX 42D). Borden did not want A&P to use a private label at all but was ultimately forced to offer to provide one. Borden then sought to minimize the substantial price concessions A&P requested. Unless such discounts were the only way to make use of idle machinery at Woodstock, Borden did not want to give other potential purchasers the same discount.[40] However, if A&P charged a lower price on private label products and thereby precipitated a price war,[41] Borden would be forced to extend the discount to others. Since Borden's dairy business was in a precarious financial position, such action could conceivably drive it to the point where it would have to withdraw from the Chicago market. Therefore, because it was in both parties' interest for A&P to maintain the prevailing price on its private label dairy products, there was no comprehensible reason for A&P and Borden to construct an illegal combination to achieve that end (*See* I.D. 199). We decline to construct one for them.

Of course, combinations having any tendency or effect of stabilizing prices are unlawful. *See United States* v. *Container Corp.*, 393 U.S. 333, 336-338 (1969); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). Although complaint counsel has introduced only circum-

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[40] In fact, because Borden probably wanted to increase volume, it considered offering the discount to others. Its counsel, however, advised Borden that such action would destroy Borden's meeting competition defense (Tr. 1076).

[41] Although, as noted, A&P and Borden lacked the ability to stabilize the market, A&P was large enough to start a price war.

stantial evidence to prove the existence of a combination intended to stabilize the prices in a given market, we recognize that such evidence may well be sufficient. *See Interstate Circuit, Inc.* v. *United States*, 306 U.S. 298, 221 (1939); *Treasure Val. Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc.*, 497 F.2d 203, 208 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974). The problem is that complaint counsel's circumstantial evidence provides more support for the proposition that both parties acted independently in deciding their pre- and post-agreement strategies than for the inference that they entered into an illegal combination. And, even if the circumstantial evidence here gives equal support to inconsistent conclusions, it is insufficient to establish liability. *Pevely Dairy Co.* v. *United States*, 178 F.2d 363, 370 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950).

We conclude that both A&P and Borden acted as rational and law abiding businessmen in this regard. *See Callaway Mills Co.* v. *FTC*, 362 F.2d 435, 441-42 (5th Cir. 1966). They did not need to engage in an illegal combination because maintenance of the retail price of milk was in the independent interests of each. "An inference of conspiracy would only arise from similar business conduct if it appeared more to the interest of competitors to adopt different practices." *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 177 F. Supp. 743, 747 (N.D. Cal. 1959), *aff'd*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963). That A&P did not lower the price it charged consumers and that Borden did not immediately lower the price it charged its purchasers "should be deemed neither surprising nor illegal." *North Carolina* v. *Chas. Pfizer & Co.*, 384 F. Supp. 265, 284 (E.D.N.C. 1974). Therefore, we reject complaint counsel's arguments and affirm Judge Hinkes' dismissal of Count III.

V. *A&P's Due Process Claim*

A&P asserts that it was denied due process of law by the Commission's delay in instituting these proceedings. It makes this claim as to all three counts. Because Counts I and III are dismissed, we respond to the claim only as it relates to Count II.

As early as February of 1967, A&P was informed that the Commission had commenced an investigation of its private label agreement with Borden and that the purpose and scope of the investigation was to determine whether an illegal price discrimination in violation of the Robinson-Patman Act and the Federal Trade Commission Act had occurred (*See* Affidavit of Richard A. Palewicz attached to Complaint Counsel's Answer to A&P's Motion to Dismiss, Oct. 20, 1972). At that point, less than 1½ years after the agreement and less than 9 months after the renewed inducement, *see* note 27 *supra*, A&P was on notice of possible litigation, especially with regard to the Robinson-Patman Act.[42] If A&P was, in fact, indifferent to this possibility of litigation, the Commission is not at fault. Certainly, A&P's lack of concern does not lead us to conclude that A&P was denied due process. In addition, we reiterate our position as stated in our Order Denying A&P's Motion to Dismiss, Jan. 19, 1973, that considering the complexity of this case as it was presented and argued by complaint counsel and A&P, the time taken to conduct the investigation leading to the issuance of the complaint in 1971 was not excessive. *Id.* at 4.

Because we have concluded that the delay in notifying A&P of the investigation and in bringing the complaint is

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[42] In 1966, the Justice Department initiated an investigation of the agreement to ascertain whether the agreement violated the order issued against Borden for discriminations in favor of A&P and Jewel Tea Company (Complaint Counsel's Answer at 3, October 20, 1972).

not unreasonable, we do not have to reach the question of prejudice to conclude that A&P has not been denied due process.[43] *United States* v. *Wilson*, 357 F. Supp. 619, 620 (E.D. Pa. 1973); *see United States* v. *Marion*, 404 U.S. 307, 324 (1971). However, because we invited A&P to renew this argument (Order at 5, Jan. 19, 1973), we address it now. We agree with Judge Hinkes (I.D. 213) that any prejudice that A&P has suffered from the passage of time is minimal and no more than that suffered by complaint counsel. Therefore, we reject A&P's claims.

VI. *The Remedy*

Since we have decided to dismiss Counts I and III, the final order refers only to the Count II violation. We have made three substantive changes in Judge Hinkes' order. First, the order states that in the future A&P has the burden of going forward with the meeting competition defense. Of course, this provision comes into effect only when A&P knows or has reason to know that prices offered to it are lower than those offered to others. We believe that such a requirement is not inconsistent with *Automatic Canteen Co.* v. *FTC*, *supra*, 346 U.S. at 79 n. 23. *See American Motor Specialities Co.*, 55 F.T.C. 1430, 1466-67 (1959), *aff'd*, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).[44] As demonstrated in this case, evidence that

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[43] It should be noted that the cases defining unreasonable delay cited by A&P are criminal cases where, unlike the situation in an FTC proceeding, the Sixth Amendment and other restrictive procedures and safeguards are applicable. *See, e.g., Genuine Parts Co.* v. *FTC*, 445 F.2d 1382, 1387-1388 (5th Cir. 1971); *United States* v. *Roundtree*, 420 F.2d 845, 852 (5th Cir. 1969).

[44] The Court in *Mid-South Distributors* v. *FTC*, *supra*, 287 F.2d at 517, stated that the Commission has the burden of going forward with evidence to show that the buyer knew that the seller could not assert the meeting competition defense. Although we are

the seller's offer was made to meet a competing seller's offer is more readily available to the buyer than to the seller. Also, this new provision is not only reasonably related to the unlawful practice found to exist, *see FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC* v. *National Lead Co.*, 352 U.S. 419, 429 (1957), but is, in fact, directly related. Borden stated explicitly that it was relying on the meeting competition defense to justify the price it quoted to A&P. A&P knew that Borden had, in fact, beaten the competitive offer yet did not communicate this to Borden. If it had, Borden might very well have withdrawn its bid. *See Kroger Co.* v. *FTC*, *supra*, 438 F.2d at 1376-77. We believe that this provision will render it substantially less likely that A&P will violate the Robinson-Patman Act in the future.

Second, the order requires A&P to distribute a copy thereof to A&P's suppliers of milk and other dairy products as well as to all of its operating divisions. By so doing, A&P will make suppliers aware that A&P is subject to an order that prohibits it from violating the Robinson-Patman Act. The notification requirement is also related to the unlawful practice. *See FTC* v. *Colgate-Palmolive Co.*, *supra*; *FTC* v. *National Lead Co.*, *supra*. The Robinson-Patman Act was enacted in large part to prohibit large buyers, especially chain stores, from using their purchasing power to pressure suppliers into granting unfair discounts. *See, e.g.*, H.R. Rep. No. 2287, 74th Cong. 2nd Sess.

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not convinced that complaint counsel have this burden, we note that they assumed it and sustained it in this case.

Of course, the Commission can "forbid acts lawful in themselves . . . [or] compel affirmative acts of compliance" to restore and rehabilitate competitive conditions. *Ekco Products Co.*, 65 F.T.C. 1163, 1216 (1964); *see FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965). Therefore, even if this burden is more stringent than that described in *Mid-South Distributors*, it can be imposed on A&P as an exercise of the Commission's remedial powers. *E.g.*, *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

3 (1936); 80 Cong. Rec. 6621, 7324, 7887, 8104 (1936). The Courts have also emphasized the need to prohibit pressure tactics from large buyers. *E.g., FTC* v. *Henry Broch & Co.*, 363 U.S. 166, 168 (1960). The record in this case shows A&P exerted such pressure on Borden. Suppliers should be made aware that if A&P exerts similar pressure on them, such a practice is illegal.

Third, the wording of the cost justification proviso is changed to make it consistent with the holding in *Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 74.[45] Complaint counsel object to the wording of the proviso because it does not place upon A&P the burden of going forward with the cost justification defense. Pursuant to *Automatic Canteen, id.* at 79, we find that either the seller or complaint counsel (if the Commission has brought a Section 2(f) complaint) must retain this burden because both are better able to develop the relevant information than is the buyer.

A&P objects to the order because it is nationwide in scope. We see no injustice in making the order nationwide. In finding the nationwide order appropriate, we have considered the frequency and duration of the violations, the business and competitive history of A&P, and the likelihood that A&P knew that it was violating the Robinson-Patman Act. *See Joseph A. Kaplan & Sons, Inc.* v. *FTC*, 347 F.2d 785, 789 (D.C. Cir. 1965). A&P's private label contract was the result of a nationwide program. It was initiated and supervised by A&P's New York dairy headquarters. This specific aspect of the nationwide program covered more than 200 A&P stores located in Indiana and

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[45] We concur with the Court in *Mid-South Distributors* v. *FTC, supra,* 287 F.2d at 520, that the *Automatic Canteen* Court's use of double negatives is "awkward." Nevertheless, we believe that such use conceivably makes the standard more restrictive than the positive approach, and therefore, we have decided to retain it in this order.

Illinois, lasted for more than six years, and resulted in substantial discriminations against competitors of A&P. The purpose of A&P's program was to increase its gross margin on milk products, an extremely important line, and thus to improve its overall gross profit position.

Complaint counsel object to the order because it does not include all products purchased by A&P for resale. Although we find some merit in the position that the conduct challenged in this case related to A&P's entire business and that A&P could conceivably evade the order by turning its attention to other products, we cannot ignore the realities of the kinds of negotiations that go on with respect to a company with thousands of stores dealing in tens of thousands of products. We also note that only A&P's dairy headquarters was involved in this contract. Although we believe that an all products order could be enforced, *see FTC* v. *Ruberoid Co., supra,* 343 U.S. at 473; *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 611 (1946); *Foremost Dairies, Inc.* v. *FTC, supra,* 348 F.2d at 681-82, we have decided to exercise our discretion and limit the order to milk and other dairy products.

We reject A&P's claim that "it is impossible to infer that, unless an order is entered, A&P will hereafter engage in the conduct alleged in the Complaint." (Appeal at 71). As noted, the purpose of A&P's program was simply to increase its gross margin on milk and other dairy products and thereby to improve its overall gross profit position. If merchandising methods now being relied upon by A&P to increase revenues fail, A&P might very well again feel the need to pressure small dairies to give A&P an unlawful discount and thereby increase its gross profits.

We also reject the contention that this case is stale. *Cf. Columbia Broadcasting System, Inc.* v. *FTC,* 414 F.2d 974, 981-82 (7th Cir. 1969), *cert. denied,* 397 U.S. 907 (1970). In fact, A&P did not terminate its relationship with Bor-

den until 1972, four months after issuance of the complaint and five years after commencement of the investigation.[46] The dairy and retail food industries have not drastically changed in the last few years.

Finally, we note that, although not specifically mentioned in the order, A&P is still entitled to all statutory defenses in any subsequent action enforcing the order. *See FTC* v. *Henry Broch & Co.*, 368 U.S. 360, 366-67 (1962); *FTC* v. *Ruberoid Co., supra*, 343 U.S. at 475-76.

Thus, for the foregoing reasons, we find that A&P violated Section 2(f) of the Robinson-Patman Act. We, therefore, enter the appended order.

April 29, 1976

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[46] A&P states that it terminated arrangements with Borden because it was offered lower prices by other dairy suppliers (Appeal at 1 n. 2).

Opinion of the Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 922—September Term, 1976.

(Argued March 24, 1977 Decided June 21, 1977.)

Docket No. 76-4179

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Before:

ANDERSON and MESKILL, *Circuit Judges,* and MARKEY, *Chief Judge,* U. S. Court of Customs and Patent Appeals.*

Petition by The Great Atlantic & Pacific Tea Company, Inc., for review of an order of the Federal Trade Commission, based on its determination that petitioner had violated §2(f) of the Robinson-Patman Act (15 U.S.C. §13(f)).

Petition denied and enforcement granted.

ANDERSON, *Circuit Judge:*

This is a petition for review of an order of the Federal Trade Commission (FTC or the Commission) in the matter of *The Great Atlantic & Pacific Tea Co., Inc.,* —— F.T.C.

* Sitting by designation.

—— [1973-76 Transfer Binder] CCH Trade Reg. Rep. ¶21,150 (1976) (hereinafter cited as *A & P*). The Commission found that A & P violated §2(f) of the Robinson-Patman Act, as amended, 15 U.S.C. §13(f)[1] by knowingly inducing or receiving illegal price discriminations from

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[1] 15 U.S.C. §13(f) provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

15 U.S.C. §§13(a) and (b), provide in pertinent part:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, whether either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for us, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ."

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination. *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The Borden Company (Borden) in the purchase of "private label" milk in the Chicago area from 1965 through 1972. We deny the petition.

Now in its seventh year of litigation, this case has developed a voluminous record and thorough arguments and briefs by both sides. The Commission has succinctly set out the underlying facts in its extensive opinion, *A & P*, —— F.T.C. at ——, ¶21,150 at 21,039-40. The case arose from A & P's attempt in the mid-1960's to secure savings in its dairy products business by switching from selling "brand label" milk in its stores (*e.g.*, milk sold under the brand name of the supplying dairy) to selling "private label" milk (*e.g.* milk sold under the A & P label). Pursuant to directions from A & P's headquarters in New York, A & P's "Chicago Unit," [2] made up of over 200 A & P stores in northern Illinois, plus about 35 in neighboring portions of northwestern Indiana and a few stores in Iowa, began negotiations with Borden for the supply of A & P private label milk and other dairy products. In August of 1965, Borden submitted a bid, premised on A & P's acceptance of limited delivery service, which Borden claimed would have reduced A & P's annual dairy-costs by $410,000. Not content with this offer, A & P sought and received a lower bid from a competing dairy, Bowman Dairy (Bowman).

Armed with a lower bid, A & P turned its attention back to Borden (contrary to its usual practice, which is to allow only one bid from a supplier, *A & P*, —— F.T.C at ——, ¶21,150 at 21,039). Elmer Schmidt, A & P's Chicago Unit buyer, telephoned Borden's Chicago chain store sales manager, Gordon Tarr, and told him that Borden's initial offer was not "in the ball park." Pressed for details as to what would be "in the ball park," Schmidt told Tarr

[2] A & P states in its Brief in this appeal that its Chicago Unit was one of 32 similar "Units" reporting to seven "Divisions," into which A & P had grouped its over 4,000 retail grocery stores.

that a $50,000 improvement "would not be a drop in the pocket." Borden then had to decide whether to re-bid. At the time, A & P was one of Borden's major customers in the Chicago area. In addition, Borden had just invested over five million dollars in a new dairy processing facility in Woodstock, Illinois; losing the A & P account would have confronted Borden with the inefficient use of the new plant. Ralph Minkler, President of Borden's Chicago Central District, testified before the Administrative Law Judge that he was told by his superiors to "save the [A & P] business." Accordingly, Borden offered to double A & P's expected annual savings under a private label program to $820,000. Minkler emphasized to A & P's Schmidt at the time this second bid was offered that it was being made only to meet the rival Bowman bid and that Borden knew "of no other way to justify this." Before accepting the second and final Borden bid, A & P's Schmidt requested a letter from Borden to the effect that the prices being offered A & P were proportionally available to others. Borden's "availability letter" stated only that it felt its prices were proper under applicable law and that it was prepared to defend them.

The second Borden bid was then reviewed by Herschel Smith, A & P's National Director of Purchases in New York. Smith testified that at the time, he regarded the second Borden bid as "substantially better" than the Bowman bid. As for Borden's "availability letter," Smith testified that he did not initially understand Borden's letter to mean that other Borden customers could enjoy proportionally lower prices such as those agreed upon with A & P, but that after consultation with a Mr. Archer (who had no recollection of such a discussion) he became convinced that Borden's letter was one of availability for all customers. After review by A & P's legal department, the second and final Borden bid was accepted by A & P.

Borden began serving A & P in the Chicago area with private label dairy products in November of 1965.

The above constitute the factual nucleus of the three-count complaint filed against A & P in 1971. Count I charged A & P with misleading Borden in the course of negotiations for the private label contract, in that A & P allegedly failed to inform Borden that its second and final bid had not merely "met", but substantially "beaten," Bowman's competitive bid. Such conduct by A & P was said to constitute a violation of §5 of the Federal Trade Commission Act, 15 U.S.C. §45, along with the policy of the Robinson-Patman Act, 15 U.S.C. §13. Count II, based on the same conduct by A & P, charged a violation of §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f)[3] (knowing inducement or reception by A & P of price discriminations from Borden which are in turn prohibited by §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a)). Finally, Count II charged a combination of A & P and Borden to stabilize and maintain the retail and wholesale prices of milk and other dairy products, contrary to §5 of the Federal Trade Commission Act, 15 U.S.C. §45.

Following an extended discovery period and hearing, the latter extending over 110 days, the Administrative Law Judge found that as to Count I, A & P "ha[d] acted unfairly and deceptively" in accepting a price offer from Borden offered to meet competition from Bowman Dairy, "when in fact such [a] meeting-competition-defense[4] was not available and without informing Borden of this fact in violation of the policy of Section 2 of the amended Clayton Act [the Robinson-Patman Act] and in violation of Section 5 of the Federal Trade Commission Act." Like-

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[3] Quoted in note 1, *supra*.

[4] The "meeting competition" defense to a charge of price discrimination, as incorporated in 15 U.S.C. §13(b), quoted at note 1, *supra*, is available to both buyers and sellers when charged with violations of the Robinson-Patman Act, 15 U.S.C. §13.

wise as to Count II, A & P was found to have violated §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), in knowingly inducing or receiving price discriminations in the purchase of fluid milk and other dairy products. As to Count III, however, which had charged a combination to stabilize and maintain milk prices between A & P and Borden, the Administrative Law Judge held that the FTC had not satisfied its burden of proof. Accordingly, Count III was dismissed.

On review by the Commission, the Administrative Law Judge's holding as to Count I, grounded on A & P's alleged deceptive practices in bargaining with Borden, was reversed. The Commission characterized the charge as "directed to the question of what must legally be disclosed during contract negotiations." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,040. That is, knowing that Borden's final bid was substantially better than Bowman's bid and also knowing that Borden would defend the legality of its bid, if necessary, on the ground that it was merely attempting to meet, but not beat, a competitor's bid from Bowman Dairy, A & P refrained from affirmatively disclosing to Borden the terms of Bowman's bid and accepted the Borden offer. The Commission did not agree with the Administrative Law Judge that such behavior constituted an unfair trade practice under the Federal Trade Commission Act, 15 U.S.C. §45, primarily because such a holding would be "contrary to normal business practice and, we think, contrary to the public interest." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,040.

In spite of the above holding as to Count I, the Commission nonetheless affirmed the finding of A & P's liability under §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), ruling that (1) the sales by Borden to A & P had met the statute's jurisdictional requirements that at least one purchase said to involve price discriminations "in commerce"; (2) that the evidence demonstrated the presence

of price discriminations, which resulted in competitive injury, *A & P*, —— F.T.C. at ——, ¶21,150 at 21,042-43; and (3) by virtue of its trade experience and common sense, A & P "knew or should have known that it was the beneficiary of a price discrimination having the requisite harmful competitive effects." Id. at ——, ¶21,150 at 21,043.

A & P had interposed two defenses to this charge of illegal price discrimination, the first of which was that it was protected from §2(f) liability through 15 U.S.C. §13(b),[5] which allows a *seller* charged with giving illegally discriminatory prices to rebutt a *prima facie* case by showing that the lower price afforded a purchaser was "made in good faith to meet an equally low price of a competitor." The Supreme Court has ruled in *Automatic Canteen* v. *FTC*, 346 U.S. 61, 74 (1953), that a buyer charged under §2(f) is not liable if the prices he induces are either within the "meeting competition" defense of the seller or not known by the buyer not to be within one of those defenses. A & P argued that the final Borden bid had been submitted by Borden in a good faith effort to meet an equally low price of a competitor (here, Bowman Dairy) and A & P was therefore unaware that Borden's bid could not be protected by the seller's "meeting competition" defense. That is, transferring Borden's potential "meeting competition" defense to A & P, the purchaser could not be held liable. Following *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), however, the Commission ruled that:

> "[W]hen a buyer is charged with violating Section 2(f) [15 U.S.C. §13(f)], the price he induces must come within the meeting competition defense not only from the seller's point of view but also from the

[5] Quoted in note 1, *supra*.

buyer's." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,043.

The mere fact that had Borden been charged with giving illegal price discriminations under §2(a) (which it was not), it *could* have defended on the ground that its final bid was merely a good faith effort to meet what it believed to be Bowman's competitive bid, was not sufficient in the Commission's view, to absolve A & P of any wrongdoing, because A & P was aware of the price terms of *both* Borden's and Bowman's bids and had concluded in 1965 that Borden had substantially beaten its competitor. Also pursuant to its application of *Kroger, supra,* the Commission further ruled against A & P's contentions that it could not be charged with knowingly inducing or receiving illegal price discriminations under §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), unless Borden had been found to have given such illegal prices under §2(a) of the same Act, 15 U.S.C. §13(a). *A & P*, —— F.T.C. at ——, ¶21,150 at 21,044.

A & P's second defense was grounded on §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a),[6] which exonerates sellers who give discriminatory prices on goods of like grade and quality if the discriminations are justified by the seller's manufacture, sale or delivery cost savings in servicing one purchaser over another. Much like the "meeting competition" defense, the purchaser may defend here on the alternative grounds that the discriminatory prices induced or received were in fact "cost justified" or that the buyer was unaware of the unavailability of that defense to the seller. *Automatic Canteen, supra,* 346 U.S. at 74; Rowe, *Price Discrimination under the Robinson-Patman Act,* §14.7 at 438 (1962) (hereinafter cited as *Rowe*). Likewise here, A & P was unsuccessful in establishing its

[6] Quoted in pertinent part in note 1, *supra.*

"cost justification" defense. The cost study presented by A & P to show the actual cost justification of Borden's prices was found " 'so defective and inadequate as to furnish no evidentiary basis' to justify the price differential that A & P received for private label products on the basis of Borden's cost savings . . . . " *A & P*, —— F.T.C. at ——, ¶21,150 at 21,047-48. As for A&P's knowledge that Borden could not justify its prices, the Commission found that FTC counsel had more than met their "initial burden" of showing such knowledge. This conclusion was buttressed by the facts that Borden had submitted its final offer solely on the basis that it was meeting competition, which put A & P on notice of the probable absence of a Borden cost justification defense, Borden's failure to furnish A & P with a clear "letter of availability" (stating that A & P's competitors could enjoy the same prices on a proportional basis), Borden's submission of cost data during the negotiations showing that it would either lose money or make a minimal profit on "private label" sales to A & P, as well as A & P's trade experience. Further, the Commission noted that after Borden had begun servicing A & P with both private label and Borden-label dairy products, Borden had tried to increase prices on its products to cover rising container, labor and social security costs. While accepting price increases on Borden-label products, A & P had initially refused a commensurate increase on private label prices, and notwithstanding the fact that the products were of like grade and quality and that Borden's costs for private and brand label dairy products were virtually the same. *A & P*, —— F.T.C. at ——, ¶21,150 at 21,046-47. In short, A & P's "meeting competition" and "cost justification" defenses failed and it was found to have violated §2(f) of the Robinson-Patman Act.

As for the third charge against A & P, combining with Borden to stabilize dairy prices, the Administrative Law

Judge's dismissal of the count was affirmed by the Commission, because the evidence presented simply did not support the charge that "A & P ever gave Borden the assurance that A & P would not create a price differential at the retail level." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,049.

Finally, A & P's claim that it was denied due process of law by the Commission's delay in initiating the proceedings was dismissed on the grounds that any delays were reasonably related to the complexity of the case and to A & P's own failure to evince any concern for a speedy resolution of the matter. The substantive remedy imposed by the Commission was the nationwide distribution of the Commission's order to its milk and dairy products suppliers as well as placing the burden of going forward with a meeting-competition defense in the future on A & P. A & P unsuccessfully challenged the nationwide scope of the distribution order.

On this appeal, then, the sole remaining issue for our consideration is the Commission's holding that A & P violated §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), by knowingly inducing or receiving illegally discriminatory prices from Borden. We first take up briefly A & P's jurisdictional objection, as well as the evidentiary basis for the Commission's conclusion, and then move on to the heart of this appeal, A & P's contention that the FTC misapplied the law with respect to its defenses of "meeting competition" and "cost justification".

A & P's jurisdictional challenge rests on the point that the Robinson-Patman Act prohibits illegal price discriminations only "where either or any of the purchasers involved in such discrimination are *in commerce* . . . ." 15 U.S.C. §13(a) (emphasis added), and upon A & P's assertion that Borden, in the circumstances of this case, was not in interstate commerce. This language has been inter-

preted recently in *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, 419 U.S. 186 (1974), to require *more* than a showing that the allegedly anticompetitive activities "affect commerce" as is the case with an action under §1 of the Sherman Act, 15 U.S.C. §1. 419 U.S. at 195. *See, Rowe*, §4.9 at 78, *et seq.* In *Gulf Oil, supra*, a private antitrust action including Robinson-Patman charges against various *sellers* of liquid asphalt, the Court ruled that the alleged illegally discriminatory sales must have occurred in the course of the seller's interstate activities and that at least one of the sales which, when compared with another, gave rise to a price discrimination, must have been made in interstate commerce. 419 U.S. at 195. Applying this test to the situation at hand, where a *buyer* has been charged with inducing or receiving illegally discriminatory prices, the Robinson-Patman Act may be invoked where at least one of the purchases by a buyer engaged in interstate activities, which gave rise to the allegedly illegal price discrimination, was in interstate commerce. In this case, A & P's "Chicago Unit" bought brand and private label milk from Borden for individual A & P stores in both Illinois and Indiana. "[S]ubstantially all of the private label milk sold to A & P came from Borden's Woodstock, Illinois, processing plant. The plant, in turn, acquired approximately 60% of its milk from Wisconsin dairy farmers. *A & P*, —— F.T.C. at ——, ¶21,150 at 21,042. While there is no doubt, then, that A & P milk purchases for the chain's Indiana stores were "in commerce" for Robinson-Patman purposes, the only remaining question is whether the Illinois-based stores' purchases from Borden were interstate transactions as well. The Commission concluded that they were, inasmuch as Borden acquired most of its milk from Wisconsin and the raw milk was not substantially altered, chemically or otherwise, by processing at the Woodstock plant. We agree. Much as in *Foremost Dairies* v. *FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965),

a prior price discrimination action also involving fluid milk, the milk here passed "in a steady flow from the farms in . . . [Wisconsin] through the . . . [Woodstock, Illinois] processing plant, where it underwent a rather negligible processing operation, which did not change its character appreciably, to the shelves of retail grocery establishments in . . . [the Chicago area]." 348 F.2d at 677 (footnote omitted.) Accordingly, A & P's milk purchases from Borden in both Illinois and Indiana were "in commerce" for purposes of Robinson-Patman Act jurisdiction,[7] which is thus plainly established.

The next issue is whether the Commission made out a *prima facie* violation of §2(f), 15 U.S.C. §13(f), by showing the knowing inducement or reception by A & P of illegal price discriminations "where the effect of such discrimination[s] may be substantially to lessen competition or tend to create a monopoly in any line of commerce. . . ." 15 U.S.C. §13(a). The Commission must show *both, i.e.*, that the prices received by A & P from Borden were lower than its competitors and that A & P knew that the prices it received violated §2(a), the provision prohibiting the

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[7] A & P's argument that as to products other than fluid milk (*i.e.*, cottage cheese, fortified skim milk, buttermilk, eggnog, onion dip and sour cream) supplied by Borden under the private A & P label, there was no Robinson-Patman jurisdiction is well-based and correct. These products were chemically changed from their origin as raw milk by a variety of processes and additions at Borden's Woodstock plant. *See, i.e., Red Apple Supermarkets, Inc.* v. *Deltown Foods, Inc.*, 419 F. Supp. 1256 (S.D.N.Y. 1976) (New York producer of Light 'n' Lively Milk, which involves blending dried, non-fat milk solids with raw, whole milk and liquid skim milk cannot be charged with illegal price discrimination under §2(a) of the Robinson-Patman Act based on the fact that some of the raw, whole milk used in the production of Light 'n' Lively originated on Pennsylvania farms); *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961) (butterfat used in the manufacture of ice cream, originating in Wisconsin, not sufficient basis to support §2(a) jurisdiction where ice cream was both manufactured and sold in Illinois.)

giving of discriminatory prices by sellers. *American Motor Specialties* v. *FTC*, 278 F.2d 225, 228 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).[8] In *Automatic Canteen, supra*, the court laid stress on the knowledge requirement of §2(f) proceedings, holding:

> "If the requirement of knowledge in §2(f) has any significant function, it is to indicate that the buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense from the seller, nevertheless proceeded to exert pressure for lower prices." 346 U.S. at 79.

In reviewing this phase of the case, we are limited by the statutory directive that "[t]he findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive." 15 U.S.C. §21(c). Put another way, "[t]he appraisal of the evidence and the inferences to be drawn from it are for the Commission, not the courts." *FTC* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746, 760 (1945); *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 73 (1934); *Foremost Dairies* v. *FTC, supra; Callaghan & Co.* v. *FTC*, 163 F.2d 359, 372 (2d Cir. 1947). Looking, then, at only some of the evidence presented by the Commission, it is clear that a *prima facie* case of illegal price discriminations knowingly induced or received by a buyer was made out. The Administrative Law Judge's thorough initial decision in this case set out the higher prices paid

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[8] A similar formulation of the §2(f) *prima facie* case is as follows:

> "Thus, the buyer's prima facie violation arises upon proof that the discriminatory concession in his favor was sizable enough to create competitive injury, and that furthermore the nature of the discrimination placed him on notice of its probable illegality." (Emphasis in original.) Rowe, *Price Discrimination under The Robinson-Patman Act*, §14.7, at 438 (1962).

by A & P's competitors for milk substantially identical to that purchased by A & P under the private label agreement in the Gary-Hammond and Valparaiso areas of Indiana, resulting in price discriminations ranging from 22.5 per cent to 5.9 per cent.

The conclusion that these substantial discriminations were injurious to competition is supported by A & P's admission that fluid milk is one of the most important commodities carried in retail grocery stores and that milk products are "sometimes used as price leaders which are tagged below the normal market price to draw customers to a store where it is hoped the customer will purchase additional products . . . ." A & P also admitted that profit margins have been "notoriously low" in the retail grocery business. Putting these three factors together, the Administrative Law Judge concluded that if A & P's competitors had received the larger discounts obtained by A & P through the private label agreement, they would have increased their net profits and could have been more competitive with A & P. It is, therefore, clear that there was substantial evidence presented to show a "reasonable possibility'," *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 50 (1948); or probability, *Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674, 680-81 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965), of adverse effects on competition.

Turning to the "knowledge" requirement of §2(f), the Administrative Law Judge was guided by *Automatic Canteen's, supra,* requirement that, to make out a *prima facie* case, the Commission must initially show only that A & P knew that the methods by which it was served and the quantities in which it purchased were the same as in the case of its competitors, or, if the methods or quantities differ, "The Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only

differences, should have known that they could not give rise to sufficient cost savings." 346 U.S. at 80. The purpose of making such a showing is to demonstrate that the discriminatory prices induced or received by the buyer were not justified by lower costs to the seller and were thus prohibited by §2(a) of the Robinson-Patman Act. The evidence here showed that A & P was purchasing Borden-label milk at the same prices charged to its competitors, that A & P was no novice in the dairy industry and had discussed pricing patterns in the Chicago area with Borden officials (facts which went towards showing the buyer's "trade experience" referred to in *Automatic Canteen, supra*, 346 U.S. at 79-80) and that Borden had informed A & P upon making its final and winning bid that it could not justify its prices on other than a "meeting competition" basis. This last statement, ruled the Administrative Law Judge, placed on A & P "the duty to inquire to determine whether its prices were legal," citing *Fred Meyer, Inc.* v. *FTC*, 359 F.2d 351, 365-66 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968). In addition, there was evidence that Borden had provided A & P with cost data during the private label negotiations showing that Borden would incur losses or gain no more than minimal profits on the private label agreement. Further, A & P had resisted cost increases on both Borden label and A & P label milk, after the initiation of the private label service, finally accepting increases on Borden-label milk and proportionately smaller ones on A & P label milk, even though A & P stores were serviced in exactly the same way as to both private label and Borden-label milk. In short, the evidence as to A & P's knowledge that Borden could not cost justify its prices was plainly substantial and may not be disturbed on this petition for review.

Faced with a *prima facie* case of §2(f) liability, however, the buyer may rebut the charge by resorting to statutory

defenses available to sellers. The major defenses are that the lower prices offered were "made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor," 15 U.S.C. §13(b), (the "meeting competition" defense) and that the lower prices made "only due allowance" for cost differences to the seller in servicing a particular customer, 15 U.S.C. §13(a) (the "cost justification" defense). In addition, and primarily to give substance to §2(f)'s requirement that only those illegal prices knowingly induced or received by a buyer can form the basis of buyer liability, the Supreme Court ruled in *Automatic Canteen, supra:*

> "We therefore conclude that a buyer is not liable under §2(f) if the lower prices he induces are *either* within one of the seller's defenses such as the cost of justification *or* not known by him not to be within one of those defenses." 346 U.S. at 74. (Emphasis added.)

A & P defended its behavior below by invoking both the "meeting competition" and "cost justification" defenses. As to the first of these we agree with the Commission that A & P could not assert the "meeting competition" defense because in 1965, at the time of the private label negotiations, A & P concluded that Borden's bid was " 'substantially better' " or lower than Bowman's, *A & P*, —— F.T.C. at ——, —— ¶21,150 at 21,044. A & P also argued that a 1973 comparison of the Borden bid with the Bowman bid disclosed Borden's to be higher. The Commission concluded, however, on the basis of substantial evidence, that Bowman's bid was in fact higher than Borden's. *A & P*, —— F.T.C. at ——, ¶21,150 at 21,044. Knowing, therefore, that Borden's final bid not only met, but substantially bettered Bowman's, A & P accepted the prices in question. The Commission's holding and rationale were to a large extent grounded on *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th

Cir.), *cert. denied,* 404 U.S. 871 (1971), another §2(f) proceeding against a retail grocery chain in which the buyer gave false price information to a seller during negotiations for private label milk service, thereby inducing illegal price discriminations. The seller, Beatrice Foods, was absolved of wrongdoing by the Commission because it was in fact responding in good faith to what it believed to be, but which in fact was not, a competitive bid, *Beatrice Foods,* 76 F.T.C. 719 (1969). The buyer, Kroger Co., however, did not escape liability. The Sixth Circuit ruled that Beatrice's absolution from §2(a) liability did not *ipso facto* exonerate Kroger because *Automatic Canteen, supra,* did not warrant such a result and "[t]o hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices." 438 F.2d at 1377. The court went on to rule:

> "In order for the buyer to be sheltered through the exoneration of the seller under Section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer." *Id.*

In support of its petition for review, A & P first argues that under *Automatic Canteen, supra,* it was entitled to a "meeting competition" defense because it had every reason to believe that had Borden been charged with knowingly giving illegally discriminatory prices (it was not, pursuant to the Commission's discretion, *see FTC* v. *Universal-Rundle Corp.,* 387 U.S. 244, 251 (1967)), it could have successfully pled its good faith effort to meet Bowman's allegedly competitive bid. We do not agree. While Borden may well have been *under the impression* that the terms of its final offer merely met the Bowman bid, A & P knew *for a fact* that the final Borden bid was substantially below "meeting competition" and beat the Bowman bid by a

good margin. As A & P itself recognizes, the Supreme Court in *Automatic Canteen* interpreted Congress' intent in enacting §2(f) as seeking to reach those buyers who, knowing full well of the little likelihood of a defense for the seller, "nevertheless proceeded to exert pressure for lower prices." 346 U.S. at 79. A & P became one of the buyers Congress was concerned with, when it pressured Borden into a second bid which in fact went beyond the bounds of "meeting competition" and went a long way below it. In short, the Sixth Circuit's rule in *Kroger* that where, in a §2(f) proceeding, the buyer interposes a "meeting competition" defense, the facts must be viewed from the point of view of the buyer as well as that of the seller, is consistent with *Automatic Canteen's supra,* maxim that buyers may induce or receive prices, which sellers can *in fact* offer, consistent with the Robinson-Patman Act. 346 U.S. at 70-71. Here, Borden's final bid was not *in fact* sheltered by the "meeting competition" defense. *See,* Curtis, *Buyer Liability under The Robinson-Patman Act,* 42 ABA Antitrust L.J. 345, 351-2 (1973).

Indeed, to rule otherwise would emasculate *Automatic Canteen, supra,* and the purpose of §2(f) in that large buyers could consistently play one seller off against another to the point where all bids are below seller's costs and then in reliance upon the seller's potential good faith and its "meeting competition" defenses, thus vindicate the final price. Such tactics would ultimately result in the acquisition of increased, and perhaps overwhelming, market power by the large buyer, all to the ultimate competitive detriment of the buyer's competitors. In addition, toleration of such abusive behavior by buyers would, in most cases, favor the largest seller, the ones most able to bear the losses resulting from such a competitive situation, with the further result of ultimate anticompetitive effects among sellers. *See generally, Rowe, supra,* §2.1 at 28.

That is, in the situation where the seller is unaware of what the buyer is doing (admittedly the rare case), the seller would, in effect, be engaging in predatory price cutting without his knowledge. While the seller may legally escape §2(a) liability in such a situation because of an assumed "meeting competition" defense, adopting A & P's argument in this case would not be, in the final analysis, in the public interest. As noted by the Supreme Court in *Utah Pie Co.* v. *Continental Baking*, 386 U.S. 685 (1967), a suit under §§1 and 2 of the Sherman Act and §2(a) of the Robinson-Patman Act, "the [Robinson-Patman] Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact." 386 U.S. at 703.

A & P's views regarding the buyer's use of a "meeting competition" defense contrast sharply with the legislative origins of the defense under §2 of the Clayton Act of 1914. Congress was concerned on the one hand with the Seller's ability to defend himself against local competition without having to cut prices in all areas where it did business, and on the other with the position of a seller trying to enter a new territory by cutting prices only locally. H. Rep. No. 627, 63rd Cong., 2d Sess., pt. 2, at 2-3 (1914); *Rowe, supra*, §9.1 at 208-9.

A & P goes on to argue, however, that even if we find *Kroger, supra*, persuasive, it should not be followed in this case, because the Kroger Co. had been found to be a "lying buyer" in its negotiations with Beatrice, while in the present controversy, A & P has been exonerated under §5 of the Federal Trade Commission Act, 15 U.S.C. §45, for its behavior during negotiations with Borden. This argument is extended to include the assertion that it is simply inconsistent for the Commission to exonerate A & P from charges of unfair trade practices and still hold it liable for a §2(f) violation. The net effect of this resolution, argues

A & P, would be nonetheless to require buyers in the future affirmatively to disclose to a bidder that its bid had not only met, but substantially beaten, that of a competitor. Such a result would allegedly run counter to the public interest in vigorous and competitive price bargaining.

Again we reject these superficially attractive arguments. While *Kroger* did indeed involve a "lying buyer," we do not regard the Sixth Circuit's ruling as strictly limited to the situation where the charged buyer affirmatively lied to the seller. The rule that the "meeting competition" defense must be looked at from the buyer's perspective where the buyer is charged under §2(f) is a salutory and correct one, whether the buyer lies or merely keeps quiet about the nature of the competing bid it has already been offered, for the policy reasons stated *supra*. Further, the line between affirmative misrepresentation, as in *Kroger*, and the present case, where Borden was told it was not "in the ballpark" and that a $50,000 reduction would not be a "drop in the pocket", is a fine one indeed. *Kroger* is, therefore, relevant to the present controversy and its sound reasoning must be applied here.

The seeming inconsistency between a finding of §2(f) liability and exoneration under a charge of unfair trade practices is, in turn, more apparent than real. One commentator recently opined with regard to this very case that "Section 5 [of the Federal Trade Commission Act, 15 U.S.C. §45] should not be used for reaching instances of price discrimination which are covered (either explicitly included or excluded) by the Robinson-Patman Act." Reeves, *Toward a Coherent Antitrust Policy: The Role of Section 5 of the Federal Trade Commission Act in Price Discrimination Regulation*, 16 B.C. Ind. & Comm. L. Rev. 151, 198 (1975).[9] That is, where a §2(f) violation can be

[9] The Reeves article discusses only the FTC's complaint in the present case and was published prior to the Administrative Law Judge's initial decision in the case.

made out by sufficient competent evidence, there is neither need nor reason to invoke the Federal Trade Commission Act. While we express no opinion as to when and under what circumstances the Commission may or may not charge a violation of the Federal Trade Commission Act,[10] the point here is that A & P's liability under §2(f) must be independently assessed without regard to any other statute, so that a finding that A & P has not engaged in unfair trade practices does not, *ipso facto,* absolve A & P under §2(f).

We hold that in this case and under these circumstances, the Commission properly deprived A & P of Borden's potential "meeting competition" defense.

Turning then to the "cost justification" defense, it is now settled that a buyer charged under §2(f) may defend on the alternative grounds that the prices induced or received were in fact cost justified to the seller or that the buyer did not know or could not reasonably have known that the prices were not cost justified to the seller. *Automatic Canteen, supra,* 346 U.S. at 74. A & P attempted to defend on the first ground of the "cost justification" defense through three cost studies, which purported to show that Borden's final offer was within its costs. The methodology and underlying bases of these studies were analyzed at length by the Administrative Law Judge, who concluded that:

> "A & P's cost justification studies . . . are so defective and inadequate as to furnish no evidentiary basis for justifying A & P's preferential price for private label items on the basis of Borden's savings in cost."

The above conclusion was adopted by the Commission, *A & P,* —— FTC at ——, ¶21,150 at 21,047-48. The A & P

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[10] For an excellent analysis and summary of past and present FTC practice under §5 of the Federal Trade Commission Act, 15 U.S.C. §45, see Rice, *Consumer Transactions,* Ch. 8 (1975).

studies were flawed in a variety of respects, many of which were attributable to the preparer's unfamiliarity with Borden's operations in the Chicago area. For example, as to delivery costs, the largest single expense item after the direct material costs of dairy products, the Administrative Law Judge excluded A & P's studies because they were originally based on wholesale milk delivery time standards prepared by the management consulting firm of Case & Co., and the underlying data supporting the conclusions reached on these studies was not produced. Further, the computation of Borden's processing costs at its Woodstock, Illinois facility was likewise flawed; instead of computing those costs directly, A & P's cost analyst first determined "unit cost" at Borden's two Wisconsin dairies and then multiplied by the number of units produced at the Woodstock plant to arrive at total Woodstock cost, assuming Wisconsin unit costs. The final figure was adjusted to reflect the fact that the Woodstock plant had higher labor costs but lower non-labor costs than the Wisconsin plants. The Commission agreed with the Administrative Law Judge that such a roundabout method of cost computation was not "reliable."

A & P nonetheless argues that the Commission acted improperly in rejecting its cost studies, in that they were made in good faith and in accordance with sound accounting principles, entitling them to "a very great weight." *Minneapolis-Honeywell Regulatory Co.*, 44 F.T.C. 351, 394 (1948). While it is, of course, true that a cost study will not be invalidated merely because one method of computation was used over another, *FTC* v. *Standard Motor Products Inc.*, 371 F.2d 613, 622 (2d Cir. 1967), for to do so would be to place unfair strictures on the party preparing the cost study where one method of computation is as fair and accurate as the next, the problems with the instant studies are that they were at some points internally inconsistent and at others simply inaccurate, *A & P*,

—— F.T.C. at ——, ¶21,150 at 21,048. The net result of A & P's efforts could not, therefore, be relied on.

Thus, A & P was unsuccessful in showing that Borden's final prices for private label milk were cost justified in fact, the first ground of the "cost justification" defense. On the other hand, the Commission did not itself submit a cost study to show the absence of cost justification.[11] A finding of §2(f) liability, therefore, has been arrived at without a square holding as to the factual absence of cost justification. This seemingly anomalous situation is naturally seized upon by A & P, which argues that the Commission's decision "stand[s] *Automatic Canteen* on its head" by assuming that the FTC "can show that the buyer was 'reasonably aware' that the prices were not cost justified without showing that they were in fact, not cost justified." Our reading of *Automatic Canteen, supra,* does not, however, support the proposition that the Commission must, in all cases, show as part of its *prima facie* case that the prices induced or received by the buyer were not in fact cost justified.

In *Automatic Canteen, supra,* the Court rejected the FTC's contention that a *prima facie* case of §2(f) liability was made out where price differentials were shown and where the buyer knew "only that the prices are lower than

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[11] The only other evidentiary material as regards cost justification was the Borden figures disclosed by Joseph Malone, which indicated that Borden would either lose money or make minimal profits on the A & P private label arrangement. The Commission did not consider those figures as a formal cost study, however, *A & P,* —— F.T.C. at ——, n. 25, ¶21,150 at 21,046 n. 25, and took them into account only as they served to demonstrate A & P's knowledge of the probability of a lack of cost justification: "Although the [Malone] data may not be completely accurate, it demonstrates that A & P at least had knowledge that the discounts could drastically affect Borden's profits, and therefore, A & P should have inquired whether the prices were available to others. See *Fred Meyer, Inc.* v. *FTC, supra,* 359 F.2d at 365-67." *A & P,* —— F.T.C. at ——, ¶21,150 at 21,046. (Footnote omitted.)

those offered other buyers." 346 at 71. In giving content to the §2(f) requirement that the prices induced or received by the buyer must be knowingly in violation of §2(a), however, the Court refrained from the opposite, and equally extreme, position, namely that the Commission must always prove the absence of cost justification in fact. Charting, instead, a middle course based both on the statutory requirement of knowledge and on the difficulties of proof as regards cost justification, 346 U.S. at 79, the Court required the FTC henceforth to go forward with some evidence that the buyer knew that the discriminatory prices it was receiving could not be cost justified, including but not limited to, the buyer's trade experience in a particular situation. 346 U.S. at 79-80. See Galanti, *Buyer Liability for Inducing or Receiving Discriminatory Prices, Terms, and Promotional Allowances: Caveat Emptor in the 1970's,* 7 Ind. L. Rev. 962, 989-90 (1974). Consistent with its view that "[e]nforcement of the provisions of §2(f) against such a buyer should not be difficult," 346 U.S. at 79, however, the Court made no mention of a requirement that the FTC show the absence of cost justification in fact through its own cost study.

This is not the first time that an argument similar to A & P's has been advanced. In *Fred Meyer, Inc.* v. *FTC,* 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341 (1968), the Commission's first §2(f) proceeding against an individual buyer since *Automatic Canteen, supra;* Note, *The Evolving Duty of an Innocent Buyer to Inquire into His Bargain under Section 2(F) of The Robinson-Patman Act,* 49 Ind. L.J. 348, 357 (1974), an operator of a chain of 13 retail supermarkets was charged under §2(f) as a result of a promotional scheme which involved a "coupon book." Each coupon entitled the purchaser to a price reduction on a particular product. Advertisers in the book paid a flat fee per coupon page and otherwise underwrote the promotion by volume-based re-

ductions, replacing goods sold or redeeming coupons in cash at an agreed rate. 359 F.2d at 356. The Ninth Circuit ruled that in showing the buyer's knowledge that the price differentials resulting from the coupon promotion could not be cost justified, the FTC had carried its burden by adducing evidence that none of the sellers involved granted quantity discounts, that Meyer itself paid the "going price" of the goods during the 11 months of the year in which there was no promotion and that during the non-promotion months, Meyer paid the same price for the goods as did its competitors. In addition,

> "[t]hat the Commission did not prove the costs of the suppliers is immaterial. Costs surveys are expensive and labyrinthine proceedings whose results are often dependent upon the cost accounting theory used. To require them in all proceedings, even against buyers, would too often be an exercise in futility. At least when the facts and the inferences to be drawn are as clear as they are on this point, we think the method of proof adopted by the Commission here is appropriate to its end, that of showing that the buyer 'is not *an unsuspecting recipient* of prohibited discriminations,' *Automatic Canteen*, 346 U.S. at 81, 73 S. Ct. at 1028. (Emphasis added.)" 359 F.2d at 364.

The above considerations are directly relevant to the present case, where the Commission showed, through substantial evidence (as summarized, *supra*) that A & P knew or reasonably should have known that the final price concessions it received from Borden were not cost justified. To here require the Commission to submit a formal cost study or other cost-measuring analysis, in addition to the testimony and other evidence it has already adduced, would go far towards foreclosing the possibility of a §2(f) proceeding even where all significant indications and factors point to the absence of cost justification and the likelihood

of illegal price discriminations. Our result is, therefore, consistent with *Automatic Canteen's* concern with the "balance of convenience" in going forward with evidence in §2(f) cases, 346 U.S. at 74, as well as with the public interest in the enforcement of §2(f).

Having failed in showing actual cost justification, A & P was thus reduced to defending the §2(f) charge through a showing that it did not know, nor had any reason to know, that Borden's prices could not be cost justified. We have already ruled that the Commission established a *prima facie* showing of A & P's knowledge that the prices in question were *not* cost justified, consistent with its burden of proof on the issue, *Beatrice Foods Co., supra*, 76 F.T.C. at 820; *Suburban Propane Gas Corp.*, 73 F.T.C. 1269, 1274-75 (1968), and thus may be brief in discussing A & P's arguments on this appeal As set out in the Commission's opinion, A & P's major evidentiary rebuttals to the FTC's *prima facie* showing of knowledge were first, that Borden's letter to A & P after the conclusion of the private label negotiations in which Borden asserted that its prices were "proper under applicable law" and that it was prepared to defend them, was interpreted by A & P to mean that other supermarkets could enjoy the same low prices offered to A & P on a proportionately equal basis. The Commission concluded, however, that the Borden letter did not constitute the "customary assurances" of proportional price availability which led to the reasonable inferences that the prices were not generally available and not cost justified, *A & P*, —— F.T.C. at ——, ¶21,150 at 21,046. Such reasonable inferences may not be disturbed on appeal, *FTC* v. *A. E. Staley Manufacturing Co., supra*, 324 U.S. at 760. Secondly, the Borden cost study prepared at the time of the private label negotiations and submitted to A & P, which purported to show losses or minimal profits by Borden as a result of private label service, was criticized by A & P as not "completely reliable," *A & P*, —— FT.C.

at ——, ¶21,150 at 21,047. Again, while one view of this Borden study is that it was "salesman's talk," designed to impress A & P with the bargain it was being offered, an equally reasonable view, given that A & P did not contemporaneously criticize the study, is that A & P knew as well as Borden of the illegality of the bargain. Thirdly, in evaluating the reasonableness of Borden's bid, A & P's Smith used a "2-2-2 formula," which reflects the general proposition that "a dairy can profitably sell milk for approximately six cents more per quart than the dairy's cost for raw milk." [12] *A & P*, —— F.T.C. at ——, ¶21,150 at 21,047 (footnote omitted). The Commission concluded that while the use of the formula was relevant to the issue of knowledge, it did not fully rebut the FTC's *prima facie* showing of knowledge.

As to the Commission's *prima facie* showing, A & P makes a variety of arguments, the thrust of which is that the evidence submitted as probative of A & P's knowledge of illegal price discriminations could be easily explained as resulting from quite different factors and motivations. By way of example, the Commission found that after the commencement of private label service in 1975, Borden charged A & P two different prices for private label and Borden-label dairy products, even though, except for a small amount devoted to advertising Borden-label products, there was "no difference in the cost to Borden of private and branded products." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,047. From these facts, among others, the Commission inferred that A & P knew that any differences in service were not cost justified. A & P now argues that "[t]he mere fact that Borden's prices to A & P for branded milk (delivered under similar conditions) were higher than for private label should perhaps have made A & P suspi-

[12] Two cents each are allocated for cartons, plant costs and profits, and delivery costs.

cious that the brand label prices were too high, rather than the private label prices were too low." Such an argument essentially invites us to retry the facts and draw new inferences in this case, which we may not do. *FTC* v. *A. E. Staley Manufacturing Co., supra*, 324 U.S. at 760. A & P's evidentiary and legal arguments as to the "cost justification" defense in support of its petition for review are unpersuasive.

We come to the last ground of the petition, namely that the Commission's final order was unnecessary and unduly broad. The order provided that in the future, A & P bear the burden of going forward with the "meeting competition" defense and also decreed the nationwide distribution of the order to A & P's operating divisions, as well as its suppliers of milk and other dairy products. Our scope of review is here limited by the principles that Congress has placed the primary responsibility for fashioning orders upon the Commission, *FTC* v. *National Lead Co.*, 352 U.S. 419, 429 (1957), and that the courts should not "lightly modify" the Commission's orders, *FTC* v. *Cement Institute*, 333 U.S. 683, 726 (1948). *See also, FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *Fedders Corp.* v. *FTC*, 529 F.2d 1398, 1401-2 (2d Cir.), *cert. denied*, —— U.S. —— (1976). In addition the Commission has been consistently granted "wide discretion" in choosing a remedy "deemed adequate to cope with the unlawful practices" involved. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611 (1946); *FTC* v. *Mandel Bros.*, 359 U.S. 385, 392 (1959); *Fedders Corp.* v. *FTC*, *supra*, 529 F.2d at 1401.

With the above in mind, we first take up A & P's argument that the order was in any event unnecessary because A & P voluntarily terminated its private label arrangement with Borden in February of 1972, four months after the issuance of the complaint in this proceeding and over five years ago to date. While it may be true that a long delay in the proceedings, accompanied by significant

changes in the market upon which the Commission's order will act, may be sufficient to warrant the remand of a case to the Commission for further evidence as to the present structure of the relevant market, *Columbia Broadcasting System, Inc.* v. *FTC*, 414 F.2d 974, 981-82 (7th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970), the Commission here found that "[t]he dairy and retail food industries have not drastically changed in the last few years." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,052. Further, in *Fedders Corp.* v. *FTC*, *supra*, a proceeding under §5(a) of the Federal Trade Commission Act, 5 U.S.C. §45(a), resulting from advertising misrepresentations, the petitioner had discontinued the unlawful activities *prior* to the filing of the Commission's complaint and had given written assurances that it would not resume them. Nonetheless, this court ruled that these factors would not bar a cease-and-desist order "where the public interest otherwise requires it. *Diener's Inc.* v. *FTC*, 161 U.S.App. D. C. 213, 494, F.2d 1132, 1133 (1974) (per curiam); *Cotherman* v. *FTC*, 417 F.2d 587, 595 (5th Cir. 1969); *Libby-Owens-Ford Glass Co.* v. *FTC*, 352 F.2d 415, 418 (6th Cir. 1965)." 529 F.2d at 1403. Here, of course, the A & P-Borden private label arrangement was abandoned only *after* the filing of the FTC complaint, while the lengthy time span between the filing of the complaint and our review is, in large part, attributable to the complexity of the case as well as the inability of both parties to move this matter along. More important, milk continues to be a major product line for supermarkets while private label milk is commonly carried on the shelves of large supermarkets. As a result, it is clearly in the public interest to enforce the Commission's order.

As to the nationwide scope of the order, A & P argues that the evidence did not show that any A & P officer or employee at the division level or above was "guilty" of

even the innocuous conduct alleged in the complaint, so that the order should be limited to A & P's "Chicago Unit." The fact remains, however, that the private label program was initiated by A & P's national headquarters in New York, and A & P's national director of purchases had a direct hand in accepting the final Borden bid here in question. In light of these factors, we cannot say that the Commission abused its "wide discretion," *Jacob Siegel Co.* v. *FTC, supra,* 327 U.S. at 611, in decreeing the nationwide distribution of the order.

It is also urged that the Commission's order providing that henceforth, A & P must carry the burden of going forward with a "meeting competition" defense is improper in that it shifts the burden of proof from the Commission to the petitioner. By its very terms, however, the order does not affect the burden of proof but only the burden of going forward, a distinction highlighted in *Automatic Canteen, supra. See, Rowe, supra,* §14.7 at 441. In a §2(f) proceeding, the Commission must continue to carry the burden of proving the knowing inducement or receipt of illegally discriminatory prices.

The petition for review is hereby denied, and enforcement of the order is granted.

Order Granting Petition

SUPREME COURT OF THE UNITED STATES

No. 77-654

GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION.

ORDER ALLOWING CERTIORARI. Filed March 20, 1978.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

Mr. Justice Stevens took no part in the consideration or decision of this petition.

No. 77-654

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 557 F. 2d 971. The opinion of the Federal Trade Commission (excerpts at Pet. App. 35a-57a) is reported at 87 F.T.C. 962, 1047-1073. The initial decision of the administrative law judge is reported at 87 F.T.C. 962, 967-1046.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1977. A timely petition for rehearing was denied on August 8, 1977. The petition for a writ of certiorari was filed November 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a buyer who knowingly induces and receives a discriminatory price substantially below any competitive offer is shielded from liability under Section 2(f) of the Clayton Act because the seller offering the lower price may have submitted its bid in a good faith effort to meet competition.

2. Whether the burden of going forward with evidence of a cost justification defense shifts to the buyer once a prima facie case has been made (a) that, in comparison with its competitors, the buyer received more favorable prices from a particular seller, and (b) that any differences in service or quantities purchased could not give rise to sufficient savings to justify the price differences.

STATEMENT

Petitioner, The Great Atlantic & Pacific Tea Company, Inc. ("A & P"), seeks review of a decision by the court of appeals affirming an order of the Federal Trade Commission ("Commission"). The order directs A & P to cease and desist from inducing or accepting unlawfully discriminatory prices in the purchase of milk and other dairy products.

1. In late 1964, A & P headquarters advised A & P divisional purchasing officials to investigate possible savings obtainable by switching from brand-label milk (*i.e.*, milk bearing a processor's label) to private-label milk (*i.e.*, milk bearing the retailer' name or brand). A & P then invited Borden, Inc. ("Borden") to submit a private-label offer for the Chicago area, where Borden had served A & P since 1950. (J.A. 1023, 1954-1955, 1144-1145).[1] In

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[1] "J.A." refers to the parties' joint appendix filed in the court below, a copy of which has been lodged with this Court.

August 1965, Borden offered a price on 11 milk and dairy items that would have permitted A & P to realize annual savings of $410,000 if A & P switched wholly to private label and continued to purchase the same volume (J.A. 3337-3369).

A & P also requested bids from other companies. A & P subsequently received an offer from Bowman Dairy ("Bowman") that was lower than Borden's August offer and would have produced annual savings of $737,000 under the same conditions. A & P notified Borden of the existence of a lower competitive offer and gave Borden the opportunity to respond. Declining to specify what Bowman had bid, A & P told Borden only that an improvement of $50,000 in Borden's initial offer would be a "drop in the pocket" and "not even in the ball park" (J.A. 2147-2148).

Borden responded with a proposal that entailed potential annual savings of $820,000. Borden presented this improved offer without allocating the savings to specific products (J.A. 932-933). It informed A & P that the offer was made on a meeting-competition basis. Though the Bowman offer was substantially less favorable (J.A. 3480), A & P told Borden only that its revised offer was "in the ball park" (J.A. 2152).

In response to A & P's request, Borden allocated the $820,000 savings figure among various products in Borden's dairy line. After reviewing the itemized proposal, A & P urged Borden to make further improvements, saying "[s]harpen your pencil a little bit because you are not quite there" (J.A. 2159). Borden interpreted this instruction to mean that its new offer was not quite as low as the competing offer in A & P's hands (J.A. 2159), and consequently reduced its prices somewhat further (J.A. 2158-2159, 2183-2185).

When Borden presented its final bid to A & P, it again warned A & P that the offer was being made on a meeting-competition basis. Borden's representative stated: "This price is given to you by us on the feeling and belief that we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis." The A & P representative replied, "You don't need to worry. I read you loud and clear * * *" (J.A. 1743-1744). The A & P representative admitted that Borden told him on this occasion and in many other conversations that the final bid was based upon "meeting competition" (J.A. 1893-1912).

A & P itself determined that Borden's offer was "substantially better" and "considerably more attractive" than Bowman's (J.A. 1160-1161, 2017-2018, 3485-3486, 4295-4334). In fact, Borden's final offer was lower than Bowman's by an amount representing nearly $83,000 in annual savings (J.A. 3480, 3482).

A & P then requested a letter from Borden stating that Borden's quoted prices were proportionately available to competitors of A & P (J.A. 1894, 1897). Borden's response to A & P stated only that the quoted prices were legal and that Borden would defend them (J.A. 4460). Although A & P's home office executive who reviewed the offer recognized that this letter did not meet A & P's request, he nonetheless approved acceptance of Borden's offer (J.A. 2010).

The Borden-A & P agreement entailed some reduction in services to A & P. Two months after the beginning of the private-label contract with A & P, Borden extended reduced service terms to all its other retail grocery customers in the Chicago area, but granted these

customers only a two percent discount.[2] The amount of the price discount A & P received varied from 6 percent to as high as 22.5 percent (J.A. 937-941, 3678).

The next year, as a result of an increase in labor and container costs, Borden approached A & P to negotiate an increase in its private-label price (J.A. 1391-1394, 4247-4249, 3511, 4086-4094).[3] Although Borden specifically stated that it had passed increased costs on to other customers in the form of higher prices, A & P refused to accept private-label price adjustments. It did accept such increases, however, on Borden-label products (J.A. 1394-1395, 3514, 4020).[4]

Borden made sales of $5 million to $6 million annually on principal dairy items to some 200 stores in A & P's Chicago unit from 1965 until 1972 (J.A. 918, 921).

2. In 1971, the Commission issued a complaint alleging that A & P had induced or received unlawful discriminatory prices from Borden in violation of Section 2(f) of the Clayton Act, 38 Stat. 730, as amended, 15

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[2]A & P asserts (Pet. 4 n. 3) that the private-label contract entailed a marked reduction in Borden's service to A & P as compared to that rendered to competitors. This contention is contrary to the administrative law judge's findings (J.A. 949-950), adopted by the Commission (J.A. 1034, 1045, 1050) and upheld by the court of appeals (Pet. App. 15a, 16a, 29a, 30a). Although there may have been some service differences, these distinctions were minimal and could not have justified the price differentials accorded to A & P.

[3]The A & P-Borden contract on private-label products provided that prices were subject to negotiated change to reflect increased costs such as container and labor costs (J.A. 935).

[4]Only a year later did A & P accept a private-label price increase—slightly more than half of the earlier proposed increase (J.A. 1399, 3550, 3559-3562, 4020, 6456).

U.S.C. 13(f).[5] After a full hearing, the administrative law judge issued an initial decision finding that A & P had violated Section 2(f).

The Commission affirmed the law judge's findings concerning A & P's violation (Pet. App. 39a-55a) and entered a cease and desist order (Pet. App. 55a-57a). Specifically the Commission found: (1) that Borden discriminated in price between A & P and A & P's competitors (J.A. 1030-1033); (2) that A & P knew or should have known that such discriminations existed, were injurious to competition, and could not be justified under any of the defenses in Section 2 of the Act (J.A. 1037); and (3) that the evidence did not support A & P's asserted affirmative defenses, including cost justification and meeting competition (Pet. App. 42a, 55a).

3. The court of appeals unanimously affirmed the Commission's order. The court held that substantial evidence supported the Commission's findings that Borden's prices to A & P were substantially below the prices at which Borden offered and sold milk products to competitors of A & P and that these price discriminations resulted in competitive injury. The court also upheld the Commission's finding that, by virtue of A & P's course of dealing with Borden and its general trade experience and common sense, A & P knew or should have known that it was the beneficiary of an unlawful price discrimination.

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[5]The complaint also included two other counts, neither of which is now at issue. One count alleged that A & P's failure to disclose to Borden that its final offering price was substantially lower than any competitor's price was an unfair and deceptive act and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. (and Supp. V) 45. The other count charged both A & P and Borden with violating Section 5 by combining to stabilize and maintain milk prices. The Commission dismissed both counts.

The court rejected A & P's argument that, because the final Borden bid had been submitted by Borden in an effort to meet a competitor's offer, Borden's possible "meeting competition" defense absolved A & P from violating Section 2(f). The court held that because A & P knew for a fact that the Borden bid "beat the Bowman bid by a good margin" (Pet. App. 19a), it could not assert a "meeting competition" defense to the charge that it knowingly induced and received an unlawful price (Pet. App. 18a-22a). The court also held that the Commission's finding that A & P had not established a cost justification defense was supported by substantial evidence and was in accord with *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61.

ARGUMENT

The petition presents no question warranting review by this Court. The ruling below is correct and conforms with the legislative purpose underlying Section 2(f) of the Clayton Act, as amended.[6] Moreover, the issues involved here have arisen only infrequently, and the decision is consistent with prior decisions of this Court and other courts of appeals.

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[6]A major purpose of the amendments and additions to the Clayton Act embodied in the Robinson-Patman Price Discrimination Act of 1936 was to remedy the economic evils associated with the buying power of large chain stores, including A & P. 79 Cong. Rec. 9078 (1935); 80 Cong. Rec. 8111, 9415 (1936); Federal Trade Commission, *Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess. (1935). As this Court has observed, the Act was designed "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168, cited with approval in *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349.

1. A & P contends (Pet. 10, 14-16) that Section 2(f) can be applied only when a seller has violated Section 2(a), and that a buyer, no matter how culpable in inducing a discriminatory price, cannot violate Section 2(f) if his seller offered the discriminatory price in good faith to meet "an equally low price of a competitor."[7] Acceptance of A & P's argument would lead to the anomalous result that a defense available to the seller only because of his ignorance of the terms of the competitor's offer would also shield the buyer who is fully cognizant of those terms. But, in enacting Section 2(f), Congress demonstrated its intention to prohibit the knowing receipt or inducement of discriminatory price offers, regardless of whether the sellers making such offers believed they were merely meeting competition.

Even if Borden acted completely in good faith,[8] A & P knew that the Borden offer not only met the earlier Bowman proposal, but in fact represented a significant improvement over that proposal. With such knowledge, A & P accepted the Borden offer. A & P thus received a discriminatory price that it knew could not be justified on meeting-competition grounds. Given A & P's awareness

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[7]In such a case, the seller could presumably sustain a Section 2(b) defense to a charge of discriminatory pricing in violation of Section 2(a).

[8]But see Pet. App. 44a, n. 19, where the Commission found that Borden made no effort to seek additional information about the bid it was attempting to meet, and therefore may have been unable to establish a Section 2(b) meeting-competition defense.

As a general matter, the Commission is not required to join the seller in a Section 2(f) proceeding and prove its liability under Section 2(a). See *Automatic Canteen Co., supra*, 346 U.S. at 79.

of the substantial disparity between the two bids[9]—a disparity to which A & P's inducement materially contributed—the Commission and the court of appeals properly determined that a meeting-competition defense was unavailable to A & P.

The court of appeals' ruling that the "meeting competition" defense must be evaluated from the buyer's perspective when the buyer is charged with a Section 2(f) violation closely follows the reasoning in *Kroger Co.* v. *Federal Trade Commission*, 438 F. 2d 1372 (C.A. 6) (Clark, J., sitting by designation), certiorari denied, 404 U.S. 871.[10] There the Sixth Circuit held (438 F. 2d at 1377) that

> the seller's successful defense under § 2(b) cannot exculpate the buyer since [the buyer] knew that the prices offered by [the seller] and received by [the buyer] were not in fact within the defense of section 2(b). To hold otherwise in this case would put a

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[9]Petitioner has offered a table (Pet. 7) designed to show that the competing offers varied only minimally in per unit prices. This comparison is misleading. When the per unit differences are multiplied by the millions of units sold throughout the area embraced by A & P's Chicago Division, the resulting dollar differences are substantial—amounting to around $83,000 annually or approximately 11 percent of the savings offered by Bowman (J.A. 3479-3480). Moreover, as the court of appeals noted, even relatively small price differentials are competitively significant in the sale of a low-price, high-volume item such as milk (Pet. App. 15a).

[10]A & P cites (Pet. 14 n. 10) *Rutledge* v. *Electronic Hose & Rubber Co.*, 327 F. Supp. 1267 (C.D. Cal.), affirmed, 511 F. 2d 668 (C.A. 9), and *Harbor Banana Distributors, Inc.* v. *Federal Trade Commission*, 499 F. 2d 395 (C.A. 5), as implicitly discrediting the court's holding in *Kroger*. But in *Rutledge* no discrimination was shown (327 F. Supp. at 1275, 511 F. 2d at 677) and in *Harbor Banana* the court found that the challenged price did not "beat," but only met, the competitor's offer.

> premium on the buyer's artifice and cunning in inducing discriminatory prices. * * * In order for the buyer to be sheltered through the exoneration of the seller under section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer.[11]

A & P errs in asserting (Pet. 16-17) that the decision below conflicts with other court of appeals' decisions holding that a seller may be protected by a meeting competition defense even if his price does not exactly match a competitor's. Those decisions simply recognize that, as a practical matter, a seller seeking to meet a competitor's undisclosed bid cannot be expected to duplicate that bid in every detail. The proper standard is the one this Court announced in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-760:

> Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. * * * [T]he statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

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[11] A & P asserts that *Kroger* is inapposite because it involved a "lying buyer" and the present case does not (Pet. App. 21a). This factual distinction, if present, is irrelevant. The Commission and the court of appeals relied upon *Kroger* for the principle that the meeting-competition defense to a Section 2(f) charge must be viewed from the buyer's perspective as well as the seller's, and that even though a seller has such a defense, a buyer can still be found to have violated Section 2(f). As the court of appeals concluded, "*Kroger* is, therefore, relevant to the present controversy and its sound reasoning must be applied here" (Pet. App. 21a, 41a-42a, 44a-45a).

But this language does not support A & P's position here, where Borden's offer was much more than a marginal improvement on Bowman's (J.A. 1039, 3385-3406, 3484-3498, 4296), and where A & P was fully apprised of the Borden offer's superiority. Under these circumstances, A & P could not successfully maintain a meeting-competition defense.

2. A & P contends (Pet. 17-20) that the Commission and the court of appeals have misinterpreted this Court's decision in *Automatic Canteen* concerning the burden of going forward with evidence on an asserted cost justification defense. The rulings below, however, fully accord with *Automatic Canteen* and do not call for reconsideration or elaboration of the criteria for establishing the non-availability of a cost justification defense in a Section 2(f) proceeding.

A seller who charges different prices may escape liability under Section 2(a) if he can show that the price differentials merely reflect differences in the cost of manufacturing or delivering the quantities involved in sales to different buyers.[12] Section 2(b) provides that, upon proof of a discrimination in price, "the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section."

In *Automatic Canteen*, this Court held that while proof of an anticompetitive price differential alone is enough to shift the burden of introducing evidence of a cost-

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[12]Section 2(a) provides in pertinent part:

> *Provided*, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

justification defense to a *seller* charged with a violation of Section 2(a) (346 U.S. at 75-76), considerations of fairness require a different evidentiary rule for buyers charged with violating Section 2(f) (*id.* at 80). Unlike a seller, a buyer who has induced or received a discriminatory price does not have ready access to information necessary to establish a cost-justification defense. Therefore, this Court required an additional showing by the Commission before the burden of presenting evidence on cost justification could be shifted to a buyer. The Court defined that additional showing as follows (*ibid.*):

> The Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings. The showing of knowledge, of course, will depend to some extent on the size of the discrepancy between cost differential and price differential, so that the two questions are not isolated. A showing that the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference should be sufficient.

Asserting that the Commission "acknowledged" that there were differences in the way A & P and its competitors were served that produced cost savings, A & P argues (Pet. 17-18) that the Commission did not show

that those savings were insufficient to justify the different prices offered and therefore did not establish a prima facie case under the *Automatic Canteen* test. In fact, however, the Commission did find that the service differences were "often minimal" and in any event did not produce sufficient cost savings to justify the price differentials.[13] The Commission also found that A & P knew or should have known, first, that the methods and quantities of sale in many instances were substantially the same (J.A. 964) and, second, that even where service discrepancies between A & P and its competitors did exist, the significantly lower prices given to A & P could not be cost justified (Pet. App. 48a-52a).[14]

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[13]At the pages cited by A & P (Pet. App. 41a, 48a-49a), the Commission stated:

> In addition, although there were differences in the way A & P and its competitors were served, the distinctions were often minimal * * *.
>
> * * * * *
>
> Many competitors were charged a much higher price than A & P for Borden's milk products even though they bought in greater quantities than the individual A & P stores with which they were competing * * *. Although many of these stores received more service than A & P, the service savings to Borden could not in any way justify the price differentials * * *. In addition, even those companies that received limited service paid a higher price than A & P * * *, a price differential that was not justified by the saving of such costs as advertising * * *.

See also Finding 134 (J.A. 963).

[14]As the court of appeals noted, Borden's statement to A & P that the offer could only be justified on a meeting-competition basis, Borden's failure to furnish A & P with a requested letter stating that the prices charged to A & P were available to other buyers, Borden's submission to A & P during negotiations of cost data showing the A & P private-label prices to be either below cost or at a minimal profit level, A & P's own purchases of physically identical products under private label and the Borden label at substantially different prices, A & P's acceptance of later cost increases in the price of Borden label but not private-label products, and A & P's general trade experience, all demonstrated that A & P knew or should have known that the price differences could not be cost justified (Pet. App. 10a, 16a).

Under *Automatic Canteen*, the burden then shifted to A & P to come forward with evidence to rebut the prima facie showing of knowledge that the price differentials could not be cost justified. A & P failed to do so (Pet. App. 53a-54a). This factual determination by the Commission was upheld by the court of appeals (Pet. App. 28a-30a) and does not merit review by this Court.[15]

A & P further contends (Pet. 18 n. 14) that the court below erred in failing to require the Commission to make an independent finding that in fact the price differentials lacked cost justification. The point is academic, however, because the Commission *did* find that the differences were not cost justified. The Commission adopted the law judge's finding that the price discrimination in favor of Borden did not reflect differences in the cost of manufacture, sale or delivery to A & P (J.A. 949-950, 1023).[16]

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[15]A & P submitted *post litem* cost justification studies in an attempt to demonstrate that, quite apart from what it knew at the time it received the favorable prices, the price differences were in fact cost justified. The Commission affirmed the administrative law judge's findings that the studies were inadequate and defective. The Commission found the studies so flawed that "we would not find them persuasive under any reasonable standard" (Pet. App. 54a). The Commission observed (Pet. App. 55a) that it

> would be willing to lower the standard if it was demonstrated that the buyer could not obtain necessary records from the seller to undertake the study. * * * A & P alleges that hostility existed between Borden and itself * * * but does not confirm that these "inherent conflicts" prevented it from obtaining records from Borden. In fact, the record shows that A & P was able to get the documents it needed.

Thus, contrary to A & P's suggestion (Pet. 20), the Commission did not insist upon an "impossible" standard for A & P's attempted cost justification. The court of appeals found that the Commission's rejection of the studies was fully justified (Pet. App. 23a-24a).

[16]The court of appeals apparently overlooked this finding in stating that "§2(f) liability, therefore, has been arrived at without a square

3. The underlying theme of A & P's petition (see Pet. 9-14) is that the result below will stifle robust negotiation. To the extent that the outcome of this case may limit larger buyers' bargaining power in the special circumstances presented here, A & P's real complaint is not with the decision below but with the Act itself, which was specifically intended to impose limits on the exercise of such bargaining power. Changes in the balance struck by the Act should be sought not from the courts but from Congress, which has evinced a continuing interest in the administration of the Robinson-Patman Act. See, *e.g.*, Report of the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the House Committee on Small Business, *Recent Efforts to Amend or Repeal the Robinson-Patman Act,* H.R. Rep. No. 94-1738, 94th Cong., 2d Sess. (Committee Print 1976).

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holding as to the factual absence of cost justification" (Pet. App. 24a-25a). The oversight is harmless, however, in view of the fact that, as the court correctly noted, *Automatic Canteen* does not impose upon the Commission the burden of affirmatively proving the absence of cost justification (Pet. App. 25a-26a). See 346 U.S. at 80. Accord, *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351, 364 (C.A. 9), reversed in part on other grounds, 390 U.S. 341.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Pursuant to Rule 24(4) of the Rules of this Court, The Great Atlantic & Pacific Tea Company, Inc. ("A&P") respectfully submits this reply to the brief of the Federal Trade Commission ("FTC" or "Commission") in opposition.

The FTC's brief is almost exclusively a zealous effort to minimize the importance of the questions raised by A&P's petition. Indeed, the Commission's brief even goes so far as to deny the existence of the basic issue raised by the court of appeals itself when it ruled:

> "the Commission did not itself submit a cost study to show the absence of cost justification. A finding of §2(f) liability, therefore, has been arrived at with-

out a square holding as to the factual absence of cost justification." (Pet. App. 24a-25a)[1]

There is simply no support for the FTC's assertions that the issues raised in A&P's petition are unimportant and arise infrequently (FTC Br. 7). To the contrary, in the everyday world wholesale buyers like A&P (who must deal with thousands of sellers and can have only the vaguest notion of their costs) are the public's main line of defense in the battle against rising prices. To deprive such buyers of their right to bargain (or to force them to accept unverifiable statements concerning costs, made by salesmen anxious to get the highest possible price) would be to substantially impair this line of defense. Thus, the petition raises significant and recurring questions of critical importance not only to American businessmen but to the public at large.

I.

The Meeting Competition Defense Should Have Been Available to A&P.

A&P does not seek to change the balance struck by the Robinson-Patman Act (FTC Br. 15), but only to have the Act construed in the light of commercial realities recognized by the Commission itself in this very case when it found that no unfair trade practice had occurred here (see Pet. 11-14). In contrast, the FTC's brief ignores the petitioner's first argument based on that ruling (*i.e.*, that the decision below would require buyers to restrict their bargaining contrary to the public interest) and proceeds

[1] "Pet." refers to A&P's Petition for a Writ of Certiorari, "Pet. App." to the Appendices to A&P's Petition, and "JA" to the Joint Appendix filed with the court below, a copy of which has been lodged with this Court.

instead to assert that A&P was properly deprived of the "meeting competition" defense.

In doing so, the Commission does not quarrel with A&P's authorities holding that a seller may "beat" the competitive price without losing the meeting competition defense (Pet. 16-17). It states: "Those decisions simply recognize that, as a practical matter, a seller seeking to meet a competitor's undisclosed bid cannot be expected to duplicate that bid in every detail" (FTC Br. 10). The Commission contends, however, that A&P cannot avail itself of the meeting competition defense because "Borden's offer was much more than a marginal improvement on Bowman's" (FTC Br. 11).

At the same time, the Commission concedes the accuracy of the prices quoted at page 7 of the petition, which shows that the difference between the competitive offers was only fractions of mills or no more than ⅓ of 1%. Instead, the FTC asserts: "When the per unit differences are multiplied by the millions of units sold throughout the area embraced by A&P's Chicago Division, the resulting dollar differences are substantial—amounting to around $83,000 annually . . ." (FTC Br. 9, n.9). While the $83,000 figure is inflated, even $83,000 would be less than 1½% of the over $5,600,000 A&P was then paying Borden annually merely for the 11 products to be furnished in private label.[2]

Further, the Commission's insistence on aggregating the admittedly miniscule unit price differences penalizes the large buyer for no reason other than its size. According to this reasoning (adopted by the court below), a

[2] We have previously pointed out (Pet. 4, n.4) that A&P never realized the $83,000 Borden had predicted, but even 1½% can hardly be described as "substantial" when Borden and Bowman offered discounts of 26% and more to all volume customers (JA 3571-73, 3580).

large buyer could never avail itself of the meeting competition defense unless the winning bid happened to match exactly the competing bid—down to the fraction of a mill. We submit that such a result cannot be reconciled with judicial precedents or commercial practicalities.

This Court in *FTC* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945), held that a seller who "beat" a competitor's price did not lose the meeting competition defense provided that the seller showed "that the price was made in good faith to meet a competitor's . . ." (p. 759). *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), would at most extend to buyers a "good faith" acceptance requirement comparable to the "good faith" required of sellers by *Staley*.[3]

Here, A&P has been exonerated of any charge of unfairness or bad faith on the undisputed facts. Borden would not provide any customer with details as to its costs or its dealings with other customers. A&P received a bid from Borden that offered it estimated annual savings of $410,000, and then a bid from Bowman offering savings of over $737,000. Borden then offered estimated savings of $820,000, stating it was doing so to meet competition.[4] In accepting the bid, A&P asked Borden to make these prices available to other customers, and Borden replied that

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[3] This is clear from the crucial portion of the *Kroger* ruling omitted from the FTC brief:

> "The controlling point here is not the 'hard bargaining' nor the 'price levels' but the *misrepresentation* of the [competitor's] bid, in order to induce a discriminatory price." (438 F.2d at 1378, emphasis in original)

[4] The FTC's reference to "somewhat further" reductions (beyond $820,000) in Borden's prices resulting from a "sharpen your pencil" remark (FTC Br. 3) is misleading. Borden's first response to the opportunity to submit a second bid was to offer savings of $820,000, and that amount remained the same through two successive proposals in which these total savings were allocated to the specific products (JA 1721-1722, 1777, 1896, 3419-3420, 3445-3446, 3477-3478, 3481-3482).

its prices were proper and it was prepared to defend them.

This is not a case, as the FTC's brief implies, of a dominant buyer forcing a supplier to discriminate against the buyer's competitors. The supplier here was more powerful than A&P, which could find only one other dairy willing to bid on its business. Even in such circumstances, the decision below would put on the buyer the duty of either refusing the better offer, or advising the offeror that he may raise his offer to his competitor's level (Pet. 12). This result was expressly rejected by the Commission in dismissing the FTC Act charge against A&P, but the FTC's brief now tells this Court that the buyer must refuse the offer if it is more than a "marginal improvement" over the competitive offer. That suggestion (in the context of offers that were not even one mill apart) underscores the importance of resolving this basic question concerning a buyer's freedom to bargain.

II.

The Commission Failed to Show a Lack of Cost Justification as Required by *Automatic Canteen*.

A&P's petition pointed out that the court below failed to follow this Court's decision in *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61 (1953), in a case where the buyer was served by different methods than his competitors, by failing to require a showing of lack of cost justification as well as the buyer's knowledge of that fact. The court below agreed with A&P as to the absence of any showing of cost justification, stating: "A finding of § 2(f) liability, therefore, has been arrived at without a square holding as to the factual absence of cost justification" (Pet. App. 24a-25a).

Shunning any attempt to justify this acknowledged departure from *Automatic Canteen*, the FTC's brief contends that the question is academic because the court of appeals was in error in admitting "the factual absence of cost justification" (FTC Br. 14 n.16). It asserts that the Commission found a lack of cost justification by adopting the administrative law judge's finding to that effect (FTC Br. 14 & n.16). The record references cited are to findings by the administrative law judge (JA 949-950) and to the portion of the Commission's opinion adopting his findings "except as qualified or altered by this opinion" (JA 1023).

The FTC's brief overlooks the fact that the Commission specifically "qualified or altered" the very findings on which the brief relies. The administrative law judge's findings in issue (JA 949-950) were based on data prepared by Malone, a Borden accountant, during the Borden-A&P negotiations. These Malone figures were the *only* evidence adduced as to lack of cost justification. The Commission stated that this Malone data "may not be completely accurate" (Pet. App. 50a), and ruled that it did not demonstrate absence of cost justification (Pet. App. 51a, n.25).

Since there is nothing in this record which could possibly support a finding of absence of cost justification, the court below was correct in its conclusion that § 2(f) liability was imposed "without a square holding as to the factual absence of cost justification". Recognizing this, the court ruled that *Automatic Canteen* should not be read to impose any such burden on the FTC.[5] It is this ruling which is challenged in our petition (at pp. 17-20) and which the opposition brief seeks to sidestep without any citation of authority other than the *Fred Meyer* case (dealt with at Pet. 19).

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[5] In contrast, the FTC's brief (*e.g.*, in the second "question presented" at p 2) not only acknowledges this burden but assumes that it has been met.

The record is clear that the methods of service between A&P and its competitors differed.[6] In such a situation, *Automatic Canteen* required the FTC to show (i) "that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential", and (ii) "that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings" (346 U.S. at 80). The court of appeals acknowledged that the first showing was not made and its ruling that the second requirement was nevertheless satisfied is simply incongruous.

Finally, it should be noted that the FTC's brief states that *after* the reduced service-private label arrangement between A&P and Borden commenced, Borden offered similar (though not identical) reduced-service arrangements to its other customers without a comparable price reduction (FTC Br. 4-5).[7] This argument assumes that even if the discounts were initially cost justified, the supplier could force a buyer to accept a higher price by such subsequent

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[6] The FTC brief (at p. 13) claims that the service differences were "often minimal", improperly paraphrasing a portion of the Commission's opinion. The Commission, in referring to certain price comparisons prepared by an FTC accountant to show price discrimination, stated: "although there were differences in the way A&P and its competitors were served, the distinctions were often minimal and, in any event, are more properly considered in connection with the cost justification defense" (Pet. App. 41a). It is precisely in connection with this defense that service distinctions, minimal or otherwise, bring into play the two-pronged requirement of *Automatic Canteen* for a showing of a lack of cost justification *and* knowledge of such lack by the buyer. The opposition brief's attempt to convert the quoted language into a finding of no cost justification is another misuse of the "Malone data" discussed above (FTC Br. 13, n.13).

[7] The record indicates that none of the seven Borden customers who were called as witnesses by FTC counsel supporting the complaint to show discrimination chose this reduced service (JA 1104-1105, 1136, 1359-1360, 1467, 1512-1513, 1596, 6389-6390).

conduct. That result would not only be inflationary but unfair. If a supplier wishes to eliminate services, he should reduce his prices to all customers to the same level. If instead he charges different prices without cost justification, that is not an abuse of buyer power, but irresponsible selling.

CONCLUSION

For the reasons stated herein and in the petition, it is respectfully requested that this Court issue a writ of certiorari to review the decision below.

Dated: New York, New York
February 16, 1978

Respectfully submitted,

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In The

Supreme Court of the United States

October Term 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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In The

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October Term 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

The decision below is reported at 557 F.2d 971 and reprinted at pages 1a-32a of the Appendix to the Petition for Certiorari ("Pet. App."); it affirmed an opinion of the Federal Trade Commission ("FTC" or "Commission") reported at 87 F.T.C. 962, 1047-73 (1976), relevant portions of which are reprinted at Pet. App. 35a-57a.

The Second Circuit's decision was entered on June 21, 1977 and a timely petition for rehearing or rehearing in banc was denied on August 8, 1977 (Pet. App. 33a-34a). The petition for a writ of certiorari was duly filed on November 7, 1977, and was granted on March 20, 1978 (98 S. Ct. 1483). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1970).

The statutes involved are §§ 2(a), (b) and (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (b) and (f) (1976), principally the latter

("§ 2(f)"), and Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1976) ("§ 5 of the FTC Act"). All of these are reproduced at Pet. App. 58a-60a.

QUESTIONS PRESENTED FOR REVIEW

1. Does a buyer who accepts what appears to be the best price offered to him, by a seller who is attempting to meet competition, incur § 2(f) liability unless he can establish that his seller's price was cost justified?

2. Did the court below err in holding that the buyer violated § 2(f) even though:

(a) the buyer was exonerated of charges of unfair or deceptive bargaining,

(b) the competing prices differed by no more than fractions of mills (or one-third of one percent), and

(c) there was no finding that the seller's offer was not cost-justified, was not within the meeting competition defense, or was illegal?

3. Was it error to deprive the buyer of the statutory "meeting competition" defense, and to assign to the buyer the burden of proving cost justification?

NATURE OF PROCEEDINGS

This proceeding is an attack upon an agreement between petitioner The Great Atlantic & Pacific Tea Company, Inc. ("A&P") and Borden, Inc. ("Borden") under which Borden began supplying private label milk and other dairy products to A&P's stores in the greater Chicago area in November of 1965.[1] The FTC's staff investigation commenced the following year, but the complaint was not issued until October of 1971.

[1] There were approximately 235 stores involved, located in Northern Illinois and in neighboring Northwestern Indiana. At that time, these stores were in A&P's Chicago Unit, which was one of 32 "Units", reporting to seven "Divisions" which, in turn, reported to A&P's headquarters in New York.

The charge now before this Court — that A&P knowingly received an unlawful price discrimination in violation of § 2(f) of the Robinson-Patman Act — was Count II of a three count complaint. The first count complained that A&P was guilty of unfair and deceptive practices in conducting the private label negotiations in violation of § 5 of the FTC Act. That charge was sustained by the administrative law judge, who was reversed by the Commission. Count III (also under § 5) alleged price stabilization at the wholesale and retail levels by A&P and Borden; it was dismissed by the trial judge and his ruling was affirmed by the Commission.

STATEMENT OF THE CASE

As the Commission's opinion states: "Although the record in this case is voluminous, exceeding 20,000 pages, the facts are generally not disputed" (Pet. App. 35a).[2] They are summarized below.

Initial Negotiations with Borden

Sometime in 1964, Herschel Smith, A&P's national director of purchases in New York, became aware that the wholesale prices A&P was paying Borden for milk in the New York area were higher than the retail prices at which A&P's competitors were selling milk (A204a-206a).[3] During that year Borden reduced its prices to A&P in New York by a total of some $2,000,000 annually, in part by offering private label products and eliminating services previously supplied (A204a-206a, 550a).

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[2] Despite this, the hearing took a monumental 110 days spread over three years, apparently establishing a "record" for Commission proceedings up to that time.

[3] "A" refers to pages in the Appendix and "FF" to the administrative law judge's Findings of Fact. The Appendix Table of Contents lists testimony alphabetically and chronologically by witness, exhibits in numerical order, and shows the witness through whom and the transcript page at which the exhibits were introduced.

In late 1964, Smith advised A&P's division purchasing directors (including Ira Bartels of the Chicago Division) of his experience in New York and asked them to look into the possibility of similar savings in their respective areas. Bartels relayed this information to Elmer Schmidt, the new Chicago Unit buyer whose job included responsibility, in varying degrees, for the purchase of thousands of items for his unit. The dairymen who dealt with Mr. Schmidt agreed that he was not a knowledgeable dairy buyer (A102a-103a, 178a, 473a).

Since Borden had been A&P's supplier in Chicago for many years, Schmidt asked Borden's sales representative for chain store sales, Gordon Tarr, for a private label quotation for milk and dairy products under whatever conditions would cut Borden's costs as much as possible but at a price which would result in a profit to Borden (A235a, 244a, 573a).[4] In February of 1965, Borden offered lower prices on half of the 22 dairy items which it was then supplying A&P in the Chicago metropolitan (or Chicago-Calumet) area (A104a-106a, 567a-571a).[5] While only those 11 packages were to be sold under

[4] The shorthand expression "private label" is used herein to describe this arrangement, but the concomitant changes in terms of sale were far more significant than any saving that might have resulted merely from the use of a private label. Those changes ultimately included "store-door drop delivery" and "no returns" instead of the previously provided delivery of products into the dairy case, rotation of them there to insure freshness, and taking back outdated or spoiled products at Borden's expense. In addition, products were "preordered" by A&P's stores well before delivery, instead of being ordered from the delivery truck on its arrival. Advertising and merchandising materials and allowances were eliminated, as were special deliveries and demonstrators. Although reductions in price to permit customers to meet their competition were customary (since the dairy had the risk of spoilage), these competitive allowances were also eliminated. Not one of the Borden customers allegedly discriminated against received such spartan treatment.

[5] The eleven products were: quarts, half gallons and gallons of homogenized milk, half gallons of 2% milk, quarts and half gallons of both fortified skim milk and buttermilk, quarts of chocolate milk, pints of half and half and half pints of whipping cream.

the A&P label at reduced prices, all 22 items were to be delivered on the same trucks under drastically reduced service conditions. In May and July, Borden supplemented this offer with new prices on the same products for additional areas within A&P's Chicago Unit. In August, it combined the earlier quotations (making only minor modifications) and submitted a complete private label quotation on the 11 products for the entire Chicago Unit (FF 39, A1084a). Borden claimed that this offer would "save" A&P $410,000 annually if it switched all of its purchases of those items to private label (FF 39, A1084a).[6]

In negotiating with A&P, Borden's salesmen understated their anticipated profit "per point" of product under the proposed new arrangement.[7] They testified that the cost figures they used for purposes of bargaining did not take into account any of the cost savings that would result from supplying A&P, under minimum service conditions, from Borden's new and more efficient Woodstock plant. Instead, they used total historical costs for full service delivery to all customers from Borden's obsolete Chicago dairy plant (A30a-31a, 42a-44a,

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[6] Borden's estimates of the proposed "savings" to A&P were always based on (a) ignoring any increased labor and other costs to A&P, (b) assuming that, despite the switch to private label, A&P's sales volume would remain as high as it had been in the previous year ($5,600,000 on the 11 items), and (c) assuming that Borden's brand label prices would remain at their existing levels. In fact, when A&P went to private label, Borden reduced its brand label prices to precisely those quoted in this first private label offer (*e.g.*, by some 2.5 cents on half gallons). This immediately eliminated the *entire* $410,000 alleged "saving" that Borden was urging on A&P in August of 1965 (A567a-571a, 643a-676a, 833a-834a). Moreover, A&P had increased expenses and lost sales volume when it switched to its own label (A237a-238a, 790a-794a, 799a-801a), so that the projected "savings" proved largely illusory.

[7] A "point" is a quart of milk or rough equivalent in value, such as a pint of cream; thus, a gallon of milk would be four "points". In July, Borden asserted it would make only a $.0019 gross profit "per point" on private label packages in areas outside of the Chicago-Calumet region (A618a). In an earlier similar proposal (at virtually identical prices), Borden indicated that the same profit figure would be $.0009, or half the amount used two months later (A588a).

51a-52a, 78a-79a, 89a). Ralph Minkler (the President of Borden's Chicago Central District to whom Gorden Tarr reported) characterized the cost and profit figures he used in dealing with A&P as "sales tools" designed to persuade A&P of the "tightness" of the Borden quotation and that A&P was "getting a good deal" (A59a-60a, 81a-84a).[8]

Messrs. Bartels and Smith calculated that even a saving of $410,000 would not offset the increased labor and other expenses that A&P would incur in converting to private label and limited service (A200a, 318a-319a). They therefore decided not to accept Borden's offer and asked Schmidt to make inquiries of other dairies (A200-201a, 298a-299a, 642a).

The Bowman Offer

In August of 1965, Schmidt solicited offers from the four other dairies capable of serving the Chicago Unit: Bowman Dairy Company ("Bowman"), Hawthorn Mellody Dairy, Dean Milk Company, and Sidney Wanzer & Sons (A230a-231a, 241a-242a). He succeeded in obtaining only one additional quotation for all of A&P's Chicago Unit business — from Bowman, which was represented by Frank Cannon, its General Manager (A231a, 248a-249a, 687a-707a). Cannon spent two or three weeks working up a detailed quotation with the assistance of Bowman's senior cost accountant and its outside counsel in order to be sure that the offer was in compliance with a decree against Bowman prohibiting Robinson-Patman violations (A454a-457a, 478a-479a, 482a-484a). He testified they all approved the Bowman bid on the basis of cost justification and not based on any "meeting competition" defense, and that Bowman was prepared to make the same offer to others such as

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[8] This testimony by Borden's chief negotiator demonstrates the validity of this Court's suggestion in *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61, 80 n.24 (1953), that a buyer should not be charged with statements by his natural adversary.

Kroger and High Low stores (A467a-470a, 475a, 484a-486a, 494a-495a).[9]

Cannon submitted the Bowman quotation on August 31, 1965. When he and Schmidt went over it together, Cannon explained that Bowman was offering the same reduced prices on all 22 items for private label or for Bowman label products (at A&P's option) since Bowman would have preferred to have its own brand in A&P's stores (A251a-252a, 457a-458a, 461a-462a). He also confirmed that the "markup" in Bowman's offer included a profit in addition to all overhead and other costs (A252a-253a, 462a, 482a, 493a-495a).[10]

The Commission, specifically reversing the administrative law judge, held that the Bowman quotation "was operative and could be compared to the Borden offer" (Pet. App. 36a, n.2; 43a, n.17).

Borden's First Quotation Compared with Bowman's Prices

The prices offered by Bowman were significantly lower than those contained in Borden's quotation. The most important items were quarts, half-gallons and gallons of regular

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[9] Mr. Cannon's testimony was uncontradicted and accepted by the trial judge. At the time he testified, Cannon was general manager of a dairy in Canton, Ohio, where he had not done any business with A&P. Thus (unlike other witnesses to the negotiations) he had no reason to be partial to any side of this controversy. The trial judge, in finding that A&P was not prejudiced by the delay in bringing this proceeding, stated in part that if they had been alive at the time of trial, "the testimony of Mr. Hart [Bowman's outside counsel], like that of Mr. Parmalee [Bowman's senior cost accountant] would have been only supplementary to that of Mr. Cannon who did testify" (FF 210, A1174a).

[10] Mr. Cannon further testified that the Bowman bid did not take into account A&P's willingness to preorder merchandise and to accept a butterfat content of 3.4% (the amount specified in all of the Borden quotations) instead of the 3.5% stated in Bowman's offer, and that further cost savings would have resulted from these adjustments (A462a-463a, 471a-473a, 491a-492a). Dairies commonly remove butterfat from milk and use it in making ice cream, so that butterfat has a recognized market value (A471a-473a, 491a-492a).

homogenized milk in the Chicago-Calumet area.[11] Without taking into consideration any of the other factors mentioned above which made the Bowman bid more attractive, the comparison between the actual prices offered by Borden and Bowman in August of 1965 on these three main items was as follows (A643a, 695a):

	Quarts	Half Gallons	Gallons
Borden Quote	$.1855	$.3430	$.6860
Bowman Quote	$.1696	$.3136	$.6272

A&P's unit buyer, Elmer Schmidt, looked only at the prices quoted for the 11 items on which Borden's offer was stated to yield a $410,000 price reduction, and saw that the Bowman proposal would result in a reduction of $737,000 on that price comparison alone (A772a).[12]

A&P's Reaction and Borden's Response

Borden claimed it had just completed construction of the largest and most modern dairy plant in the world at Woodstock, Illinois, which would produce substantial savings to its customers (A278a-280a). Schmidt was, therefore, surprised at the disparity between the Bowman and Borden prices. Accord-

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[11] A&P's purchases of these three items in that area made up most of the total dollar volume of all A&P's dairy products purchases for the entire Chicago Unit (A643a) and also accounted for substantially all of the allegedly discriminatory sales. Indeed, the court of appeals held that it had "no Robinson-Patman jurisdiction" as to products other than fluid milk (*e.g.*, cottage cheese, fortified skim milk, buttermilk, egg nog, onion dip, sour cream) because these products "were chemically changed from their origin as raw milk by a variety of processes and additions at Borden's Woodstock plant" and the subsequent sales were not "in commerce" (Pet. App. 13a, n.7).

[12] If he had fully analyzed the two bids, he would have seen other advantages in the Bowman offer. These included the availability of additional savings as noted above at p. 7, n.10, and the fact that Bowman would have sold its advertised brand at the same prices; in addition, Bowman was offering further reductions on other packages such as gallons of milk in glass jugs (not one of the 11 items reduced by Borden) at 10 cents a gallon or $100,000 a year under Borden's price (A283a-286a, 305a-306a, 523a-524a, 529a-530a, 942a).

ing to Messrs. Tarr and Minkler, he told them that Borden's offer was "not even in the ball park", "so far out of line it is not even funny", and that if Borden were to eliminate promotions and other assistance valued at $50,000 per year, even that additional savings "would not be a drop in the pocket" (FF 43, A1085a). He then asked whether Borden wished to stand on its previous offer or submit a new offer (A253a-254a).[13]

Borden's representatives testified that these quoted remarks by Schmidt (which were, of course, quite true) were their only clues to the competition they were facing (A68a-70a, 90a-91a, 111a, 123a-125a, 140a-141a). Because they were A&P's supplier, they believed they could retain its business even at a slightly higher price than a competitor might offer (A84a-87a, 143a-145a). After consulting others at Borden, they told Schmidt that they would submit a new quotation at a "saving" of $820,000 per year or double the previous $410,000 (FF 45, 46; A1085a-1086a).[14] He replied: "Now you are in the ballpark" (FF 46, A1086a).

Over a week later, Borden delivered a revised quotation which added two new items—glass gallons of regular and "2%" milk—spreading the "$820,000 savings" among all 13 products. This change was immediately rejected by Schmidt, whose previous comparison of the competing bids was limited to the 11 items initially offered by Borden. In Borden's final bid (delivered to Schmidt on September 21, 1965), the gallon jugs were excluded (A738a-765a), leaving them at the higher Borden brand price.

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[13] This departure from A&P's usual practice of not permitting a supplier to change its offer (A182a-184a, 201a-203a, 301a-302a) occurred because Borden had been a long-standing supplier and its bid (which essentially had not changed since February of 1965) was then seven months old (A253a-255a, 301a-302a).

[14] The $820,000 was roughly half of the $1,600,000 gross profit Borden was then earning on its sales to A&P, while bearing the expense of the services and allowances which were to be eliminated under the new arrangement (A28a-29a, 683a-686a).

Borden's Final Offer Compared With Bowman's Offer

Schmidt eventually told Cannon that there were "so few differences" between the two proposals that A&P had decided not to change suppliers (Cannon, A474a-475a). The fact is that the two were almost identical on the items Borden was offering in private label. The specific prices for the predominant products in the Chicago-Calumet area were as follows (A695a, 785a):

	Quarts	Half Gallons	Gallons
Bowman Quote	$.1696	$.3136	$.6272
Borden Quote	$.1712	$.3124	$.6248

In other words, Bowman was lower on quarts by 1.6 mills while Borden was lower on the half gallon and gallon items by 6/10ths of a mill per quart (or about 1/3 of 1% lower than Bowman's quoted prices). In addition, Bowman was offering the same prices for an accepted, advertised brand with a higher butterfat content and without preordering by A&P, and was offering comparable price reductions on its full line of products.

"Meeting Competition" References

Borden's representatives testified that, when they gave Borden's final offer to Schmidt, they stated that it was submitted in order to meet competition. Mr. Schmidt at first did not recall this but later testified as follows:

> "I am sorry, it is my recollection that they used the phrase 'meeting competition' or 'beating competition' as the reason for asking me to make sure that we would save and keep in our files the competitive bids."
>
> * * *
>
> "Q. What else was said on the subject of competitive bids, if you recall, Mr. Schmidt?
>
> "A. Again, Mr. McInerney, I don't recall specifically, but as I indicated in previous testimony here, I have the feeling that during this period of time they made reference to it, but again, as I indicated, I considered it salesmen's talk. As a consequence, my memory is not sufficient to indicate when and who said it" (A268a).

At the same meeting Schmidt requested a letter stating that the prices being offered A&P would be made available to others, and he understood "that such a letter would be forthcoming" (A260a-261a, 263a-265a, 291a-292a).[15] The letter actually given by Borden to accompany its final private label offer to A&P was dated October 1, 1965 and reads in full as follows:

> "You have our price quotations dated September 21, 1965 for milk, cream and other dairy products for several areas in Indiana and Illinois. We wish to assure you that our prices are proper under applicable law and we are prepared to defend these prices.
>
> "We appreciate your patronage.
>
> "J. G. Tarr, Sales Manager, Chain Store Sales." (A146a-147a, 848a, 882a)[16]

Elmer Schmidt recommended approval of Borden's offer, and Ira Bartels forwarded it to Herschel Smith with the above letter, Bowman's offer, and Schmidt's comparison of the two.[17]

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[15] Borden never advised A&P in writing that it was "meeting competition", nor was that remark communicated by Borden or Schmidt to anyone else at A&P (A187a-188a, 271a-274a). Furthermore, at no time did anyone from Borden ever state that the prices quoted to A&P were *not* cost justified or would *not* be made available to others (Minkler, A88a-89a, 93a-94a; Tarr, 145a-146a; Archer, 182a, 184a-185a, 187a-188a; Schmidt, 277a-278a). Borden's chief negotiator, Mr. Minkler, testified that Borden fully intended to supply private label to other customers on the same terms and conditions that they had offered to A&P (A93a-94a).

[16] The same language was used by Borden in subsequent assurances to A&P regarding other private label prices (A309a-318a, 893a-896a). Borden stated in writing that these words mean "that [Borden's] prices are proper under applicable law to cover any implications that may be required as to availability under the Robinson-Patman Act" (A894a).

[17] Mr. Schmidt had simply compared the prices on the 11 items Borden was reducing, and he did even that incorrectly. The result was that he estimated that Borden's bid would afford A&P "savings" in excess of $143,000 over Bowman's bid (A772a, 842a). The Borden offer he used purported to show savings of approximately $880,000 annually (instead of $820,000), even though Messrs. Minkler and Tarr had told him that figure was incorrect; they explained that an increase in the cost of raw milk had necessitated adjustments in their prices to those shown at p. 10 above in accordance with a formula in the offer (A77a-78a, 261a-263a, 738a-765a, 774a-775a, 780a-789a, 841a-880a) and that those adjustments would reduce the projected

A&P's Acceptance

Borden and dairies generally regarded their net prices to chain store customers as business secrets (Minkler, A87a-88a; Cannon, 470a-471a), and A&P was never advised of Borden's prices to other volume customers (Tarr, A121a; Schmidt, 236a-237a, 289a). In considering the Borden proposal, therefore, A&P had little more than the Bowman offer, Borden's assurances, and its own experience to rely on. Mr. Smith's experience had taught him that a rough guide used by dairies in figuring private label prices was to add 6 cents per quart to the published price of raw milk—2 cents for packaging, 2 cents for delivery and 2 cents for processing, overhead and profit—a formula Borden had applied in New York in 1964 (A204a-208a, 496a-514a). Both the Borden and Bowman bids were close to that rule of thumb (known as the "2-2-2 formula"), although Borden's first offer was well above it.

The decision below repeatedly relies on such assertions as: "A&P knew *for a fact* that the final Borden bid was substantially below 'meeting competition' and beat the Bowman bid by a good margin" (Pet. App. 19a, emphasis in original; see also Pet. App. 17a). Since that conclusion is based on a single snippet of Smith's testimony concerning Schmidt's superficial comparison of the two bids, we quote that testimony in context below:

> "Q. Now did you compare at that time the Bowman prices and the Borden unit prices on the various products? In other words, you had two bids, two quotes, before you and did you look to see what the prices were per quart, half gallon and gallon on each of those quotations and compare the two of them?
>
> "A. I observed that the Bowman and Borden quotations were very close to each other, that the gallons and

"savings" by $60,000 to the promised $820,000. At the time he approved the Borden offer, Mr. Smith was unaware of this and of the other differences between the two offers as a result of which Bowman's was equal to or lower than Borden's (A526a-527a, 942a).

half gallons were quite close. The quart, as a matter of fact, that Bowman was lower than Borden, and on the half gallons and gallons the difference was almost infinitesimal, it was so small.

"Q. And even though the difference may have been infinitesimal, you at that time decided to accept the Borden quotation, is that right?

"A. That is right. The document itself looks to be a much more attractive, considerably more attractive offer.

"Q. Which document, sir?

"A. The document that Mr. Bartels sent with this letter [the comparison prepared by Mr. Schmidt] shows that the Borden offer is substantially better than the one from Bowman.

* * *

"Q. And yet, if I understood you correctly, comparing the unit prices, the difference was infinitesimal at best?

"A. Yes.

"Q. Now—

"A. It was a matter of mills. Maybe 'infinitesimal' isn't a good word there. It was small, mill differences." (A215a)

The aptness of Mr. Smith's spontaneous testimony that the difference between the two offers was a mere "matter of mills" is clear from the above figures themselves, which have never been disputed. Indeed, as we have seen, the actual differences were even smaller or non-existent. After receiving approval from A&P's legal department, he authorized the acceptance of the Borden offer, and the arrangement went into effect on or about November 1, 1965. Within a year of that date, A&P's Chicago Unit had switched over to private label almost all of its purchases of products being offered by Borden in private label.

In April 1971, while Borden was still supplying it, A&P again solicited offers for its Chicago area dairy business and received lower prices from two other Chicago dairies, Dean

Milk and Spinney Run. Accordingly, in February of 1972, A&P terminated Borden as a supplier in the Chicago area. By the time the hearings before the Commission commenced in 1973, Borden had little incentive to help A&P reconstruct Borden's 1965 costs.

SUMMARY OF ARGUMENT

This case raises the basic issue of whether a buyer may accept the lowest price offered by competing sellers without incurring Robinson-Patman Act liability. The ruling below would require the buyer to forego the bargain *unless* he can prove, to the Commission's satisfaction, that any difference between the seller's price to him and to others is justified by the seller's cost savings in dealing with him. If that ruling is allowed to stand, the results would be to make it illegal for a purchaser to solicit competitive bids and accept the lowest offer, to restrain bargaining by buyers and competition among sellers, to deprive consumers of the benefits of both, and ultimately to stabilize prices at higher levels.

The Commission, in reversing the trial judge's finding that A&P's conduct violated § 5 of the FTC Act, concluded that it would be "contrary to normal business practice and . . . contrary to the public interest" to impose on a buyer a duty to disclose the terms of a competitive bid or to refrain from accepting the lower offer (Pet. App. 38a-39a). Yet that is the practical effect of the Commission's application of § 2(f) to the same conduct, with results which are anticompetitive and against the public interest for the very reasons stated by the Commission itself (Point I).

Section 2(f) makes it unlawful for a buyer "knowingly to induce or receive a discrimination in price" prohibited to a seller and having anticompetitive effects. In *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61 (1953), this Court expressed concern that expansive enforcement of § 2(f) might "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (346 U.S. at

63). It held that a buyer is not liable under § 2(f) unless he accepts a discriminatory price which is (i) not "within one or more of the 'defenses' available to sellers", such as cost justification or meeting competition (346 U.S. at 71), and (ii) "known by him [the buyer] not to be within one of those defenses" (346 U.S. at 74). Thus the threshhold requirement for buyer liability is that it is dependent upon seller liability not present here (Point IIA).

The decision below is not only inconsistent with *Automatic Canteen* and with the Commission's own ruling under § 5 of the FTC Act, it is inconsistent with virtually all of the rulings of the other circuit courts on the meeting competition defense. An objective comparison of the two bids shows that the Bowman bid was equivalent to or lower than the Borden bid. But even if the Borden bid was marginally (*i.e.*, no more than 1.5%, accepting the FTC's figures) lower than Bowman's offer, rather than merely "meeting" it, an exact matching of the competing offer is not necessary; the meeting competition defense remains available to a seller who makes a better offer in good faith, as other courts have consistently held. Thus Borden's offer was within that defense, and A&P should have been allowed to assert it (Point IIB).

The court below concluded that because A&P *believed* that Borden's bid was lower, A&P was "properly deprived" of the shelter of the "meeting competition" defense (Pet. App. 22a, 42a), citing *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). The *Kroger* case held that a buyer could not rely on the seller's meeting competition defense when the buyer had fraudulently misrepresented the competition the seller was facing. The case thus created a "lying buyer" exception to this Court's rule that § 2(f) liability is entirely derivative from § 2(a) liability. In the *Kroger* court's own words, "[t]he controlling point here is . . . the *misrepresentation*" (438 F.2d at 1378, emphasis in original). Even if that decision were correct (as to which we submit that the same injunctive result should instead have been reached under

§ 5 of the FTC Act), it is clearly inapplicable to this case of a "silent buyer" exonerated of any deceptive practice (Point IIC).

Finally, the court below erred in holding that the FTC did not have to show that Borden's prices to A&P were not cost justified and in holding A&P liable without any finding of lack of cost justification. The precise issue in *Automatic Canteen* was whether the buyer has the burden of proving cost justification where (as here) the methods by which he is served, or the quantities in which he buys, differ from those of his seller's other customers. In such a case, this Court held that it is the Commission which must "show that such differences could not give rise to sufficient savings . . . to justify the price differential" (346 U.S. at 80). The ruling below places that burden on the buyer (the party least likely to be able to satisfy it), and makes the cost justification defense unavailable, as a practical matter, in a § 2(f) case because of the difficulties inherent in a buyer's proving costs which would be difficult enough for the seller himself to prove (Point III).

Each of these key rulings, we submit, endangers the robust bargaining between buyer and seller (and particularly buyers dealing with the monolithic pricing structure of powerful sellers) which this Court sought to foster in the *Automatic Canteen* case. The rationale of that decision has been warmly endorsed by courts and commentators for 25 years and should not be abandoned now. To do so would be a great disservice not only to the business community but to the public at large.

ARGUMENT

I.

THE DECISION BELOW RESTRAINS COMPETITIVE BUYING CONTRARY TO THE PUBLIC INTEREST.

Section 2(f) of the Robinson-Patman Act makes it unlawful for a buyer to "knowingly" induce or receive an unlawful discriminatory price "where the effect . . . may be substantially

to lessen competition. . ." (Pet.App. 58a). Until the present case, § 2(f) had never been held to prohibit soliciting competitive bids from sellers and purchasing from the lowest bidder—a normal business practice which tends to reduce prices (first to the soliciting buyer and then to others similarly situated) and to curb excesses of powerful sellers. The decision under review, however, challenges that normal business practice. It squarely presents the question of whether a buyer who has made no material misrepresentation may solicit bids and accept in silence the lower of two prices competitively offered.

In dismissing the deceptive practices charge against A&P under § 5 of the FTC Act (admittedly "based on the same conduct" as the § 2(f) count, Pet. App. 5a) the Commission held:

> "The imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest." (Pet. App. 38a)[18]
>
> * * *
>
> "We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid." (Pet. App. 39a)

The Commission concluded that A&P had not acted improperly because it had no duty of disclosure to Borden (Pet. App. 39a,

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[18] The opinion at this point quoted approvingly from *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965):

> "The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place." (Pet. App. 38a)

Since the Commission found A&P innocent of any meaningful misrepresentation, and held that other allegations of peripheral misstatements by A&P were irrelevant (Pet. App. 37a, n.5), we do not examine these charges in detail and refute them here.

n.7). It therefore rejected the FTC Act charge, a decision which the Department of Justice's 1977 *Report on the Robinson-Patman Act* praised as pro-competitive (at pp. 63-64). However, the practical result of the FTC's decision on the § 2(f) count, if it is allowed to stand, would be to impose on buyers a duty to disclose competitive prices, thus requiring them to act in a manner the FTC itself found anticompetitive.[19]

Neither the Commission nor the court below explained why the result condemned as "contrary to the public interest" in Count I was embraced by the FTC in Count II. Both counts invoked the policy of the Robinson-Patman Act in challenging the same conduct, and both sought to impose on the buyer the dilemma of either refusing the better offer, or advising the offeror that it was low so that he might increase his price.

The court of appeals sought to skirt this "seeming inconsistency" by the facile assertion that "A&P's liability under § 2(f) must be independently assessed without regard to any other statute" (Pet. App. 22a). It then affirmed the inconsistency because of its apprehension that, if purchasers could freely choose between competing bids, they might induce "predatory price cutting" by the seller "without his knowledge" (Pet. App. 20a).[20] The situation the court envisaged is "admittedly the rare case" (*ibid.*), and quite contrary to the fears expressed in the Commission's opinion:

> "We recognize the need to curb undue pressure on sellers by powerful buyers such as A&P but do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that such a change

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[19] Commentators have referred to the § 2(f) ruling as ironic, Comment, *Interseller Price Verification and Hard Bargaining: Reconciliation of the Sherman Act, Robinson-Patman Act, and the Forces of Competition*, 46 Ford. L. Rev. 824, 870 (1978), and of dubious validity, H. Shniderman, *Price Discrimination in Perspective* 143 (1977).

[20] It would appear that a low price cannot be "predatory" unless offered by a seller with consciously anticompetitive objectives, and not unwittingly. A low price wrung from a seller by hard bargaining is precisely the kind of price which the antitrust laws were designed to foster.

> would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution." (Pet. App. 38a)

Thus the Commission recognized in Count I (but ignored in Count II) the strong public policy favoring robust bargaining between buyers and sellers, which is an essential element of the competitive climate the antitrust laws were designed to assure. We respectfully submit that the court below erred in making these values subservient to its concern for possible "predatory price cutting" (which was not found to exist in this case, and for which the Sherman and Clayton Acts provide ready remedies, 15 U.S.C., §§ 1, 2, 13a).

In *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61 (1953), this Court foresaw that expansive enforcement of § 2(f) might "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (346 U.S. at 63); it stated in part:

> "[P]utting the buyer at his peril whenever he engages in price bargaining . . . must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated." (346 U.S. at 73-74, footnote omitted)

More recently, the Department of Justice's 1977 *Report on the Robinson-Patman Act* (at 63) stated:

> "While this provision [§2(f)] was intended to counteract the power of large buyers to 'coerce' non-justified price discriminations from *smaller* sellers its applicability is general and therefore is restrictive in situations where vigorous bargaining by a buyer is necessary to bring down high prices charged by large oligopolistic manufacturers.
>
> "It is anomalous that a statute designed to protect small businessmen has the effect of governing the competitive relationships between giant companies for the benefit of those with oligopoly selling power." (Emphasis in original)

It would be even more anomalous if conduct of the very kind deemed desirable by the Department of Justice, and

applauded by the Commission in dealing with the FTC Act charge, were at the same time enjoined as unlawful under Section 2(f).

II.

A&P WAS IMPROPERLY DEPRIVED OF THE "MEETING COMPETITION" DEFENSE.

As noted above, there was no finding that Borden would not have had a "meeting competition" defense to any Robinson-Patman charge against it, or that it would have been liable if faced with any such charge.[21] On the contrary, it seems clear that Borden would have had a meeting competition defense which would also have protected A&P but for the novel approach taken below. The court of appeals held that A&P was "properly deprived" of that defense, whether or not it would have been available to Borden, because it found that A&P *believed* it was accepting a substantially better offer.

The order entered here is indeed a drastic remedy for harboring that "evil thought". Among other things, it prohibits A&P from accepting a price that A&P "knows or has reason to know" is below the price to other purchasers *unless* "A&P can show that said price was granted to it by the supplier to meet a competitor's equally low price, which price A&P reasonably believed to be lawful" (Pet. App. 56a). By requiring equality in competitive bidding, the order reflects the unrealism of the decision on which it is based; both, we submit, are plainly erroneous.

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[21] Section 2(b) of the Robinson-Patman Act (Pet. App. 59a-60a) provides that a seller may rebut a *prima facie* case of price discrimination "by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ." This is "an absolute defense to a charge of violating § 2(a), notwithstanding the existence of the statutorily prohibited anticompetitive effect". *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 514 (1963). At the hearings below, complaint counsel's case against A&P was premised on the argument (accepted by the trial judge) that Borden's final proposal was offered in good faith to meet competition (FF 45, A1085a-1086a).

A. The Statute Makes Buyer Liability Dependent On Seller Liability Not Present Here.

Section 2(f) simply states that it is unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited by this section". Thus in order for Section 2(f) liability to exist, the Commission must show that the price the buyer received was in violation of Section 2(a) — which applies, of course, only to sellers — and that the buyer knew or should have known it. In other words, the first element of § 2(f) liability is that it is entirely derivative from § 2(a) liability.[22] Or, as stated more precisely in *Automatic Canteen:*

> "It is therefore apparent that the discriminatory price that buyers are forbidden by § 2(f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act. . . ." (346 U.S. at 70)

It follows that when a defense is available to the seller, it also exonerates the buyer.

> "§ 2(f), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within one or more of the 'defenses' available to sellers, such as . . . cost differences . . . or bona fide attempts to meet competition, as those defenses are set out in the provisos of §§ 2(a) and 2(b)." (346 U.S. at 71)

Moreover, the "knowingly" requirement of the statute means that the buyer is not liable unless he knew (or should have known) that the seller had no defense:

> "We therefore conclude that a buyer is not liable under § 2(f) if the lower prices he induces are either within

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[22] Congressman Utterback, one of the floor managers of the Robinson-Patman Act, stated at the time of its passage: "This paragraph [§ 2(f)] makes the buyer liable for knowingly inducing or receiving any discrimination in price which is unlawful under the first paragraph of the amendment [§ 2(a)]." 80 Cong. Rec. 9419 (1936). The derivative nature of the charge here is underscored by the charging language: "A&P knew or should have known that such prices constituted discriminations in price prohibited [to the seller] by subsection (a) of Section 2 of the Clayton Act. . . ." (Complaint, ¶ 13; A7a).

> one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." (346 U.S. at 74)

In *Mid-South Distributors* v. *FTC*, 287 F.2d 512, 517 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961), referring to both the cost justification and meeting competition defenses, the Fifth Circuit stated:

> "[I]n a § 2(f) proceeding it is a part of the Commission's burden of going forward with the evidence to show that the buyer *knew* that the seller could *not* justify the price differential under either one or both [of these two defenses]." (Emphasis in original)

See also FTC v. *Simplicity Pattern Co.*, 360 U.S. 55, 65 n.6 (1959).

With the exception of this case and *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), discussed below, the courts, the co-author of the Robinson-Patman Act, and other writers on the subject including even the Commission itself, are all in accord as to the derivative nature of Section 2(f) liability.[23]

B. Borden's Bid Was Plainly Lawful Under the Meeting Competition Defense, Which A&P Should Have Been Allowed to Assert.

This Court, in the landmark case of *FTC* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746; 759 (1945), established the principle that a seller need only show that he offered his price "in good faith to meet a competitor's" in order to establish the meeting competition defense. As the 1955 *Report of the Attorney General's National Committee to Study the Antitrust Laws* (at

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[23] *E.g.*, *Texas Gulf Sulphur Co.* v. *J. R. Simplot Co.*, 418 F.2d 793, 803-05 (9th Cir. 1969); *American Motor Specialties Co.* v. *FTC*, 278 F.2d 225, 229 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960); W. Patman, *Complete Guide to the Robinson-Patman Act* 157 (1963); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 421, 447 (1962); Scher, *New Directions in Buyer's Liability Under the Robinson-Patman Act*, 39 ABA Antitrust L.J. 884, 887 (1970); and *Sears, Roebuck & Co.*, 66 F.T.C. 371, 376, 378 (1964).

183) expressed it: "The Committee further believes that a seller should not be forced to meet a competitor's equally low price to the last fraction of a cent."

The commentators agree that to require an exact matching of competitive bids is commercially unrealistic and economically unsound.[24] Furthermore, with the sole exception of this case, those appellate courts which have had occasion to consider the subject have uniformly held that the meeting competition defense is available even to one who makes a better offer, provided that he acted in good faith. *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 726 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Jones* v. *Borden Co.*, 430 F.2d 568 (5th Cir. 1970); *National Dairy Products Corp.* v. *FTC*, 395 F.2d 517 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968); *Callaway Mills Co.* v. *FTC*, 362 F.2d 435 (5th Cir. 1966); *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).[25]

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[24] "Any chipping away at the availability of the 'good faith meeting competition' defense simply lends the sanctions of the Patman Act to encourage resistance to price competition." Shniderman, *The Impact of the Robinson-Patman Act on Pricing Flexibility*, 57 Nw. U.L. Rev. 173, 178 (1962). "Denying the option to shade competitive prices necessarily forecloses fully active price competition." Kuenzel & Schiffres, *Making Sense of Robinson-Patman: The Need to Revitalize its Affirmative Defenses*, 62 Va. L. Rev. 1211, 1249 (1976). "An individual seller can never know the highest price that will secure a marginal sale, thereby 'meeting' competition." Cooper, *Price Discrimination Law and Economic Efficiency*, 75 Mich. L. Rev. 962, 977 (1977).

[25] Earlier Second Circuit and FTC decisions held the same view. *Samuel H. Moss, Inc.* v. *FTC*, 155 F.2d 1016 (2d Cir. 1946, per curiam); *Kohner* v. *Wechsler*, 477 F.2d 666, 672-73 (2d Cir. 1973; Timbers, J., concurring); *Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963). *See also Beatrice Foods Co.*, 76 F.T.C. 719, 811-12 (1969); on appeal to the Sixth Circuit, *Beatrice* became the *Kroger* case referred to below (pp. 26-27). An analogous *de minimis* doctrine has developed in the cost justification cases in which a cost study reveals a small residue between the price differential and the cost savings. *See United States* v. *Borden Co.*, 1961 CCH Trade Cas. ¶ 69,946 (N.D. Ill. 1961), *rev'd on other grounds*, 370 U.S. 460 (1962).

International Air Industries, Inc. v. *American Excelsior Co., supra,* the most recent of the cases cited above, is illustrative. There, the defendant beat a competing offer of a 14.5% discount by offering a 25% discount, which the competitor met. The defendant then offered a 32.5% discount, decisively undercutting its rival a second time. The Fifth Circuit held that the defendant's response was within the meeting competition defense. In the instant case, the competing prices were within "a matter of mills" or about 1/3 of 1% of each other (see p. 10 above). The maximum total difference between the two bids, as asserted by the Government, was "nearly $83,000 in annual savings" (Brief in Opposition, p. 4) or only 1.5% of the $5,600,000 which A&P was then paying Borden annually for the 11 items to be reduced in price (and less when compared with all of the Chicago Unit's dairy purchases). While even that difference may well have been illusory, under the standards applied in the above cases, it surely was no bar to the "meeting competition" defense here.

Against this background, the decision below is, to say the least, perplexing in its conclusion that: "While Borden may well have been *under the impression* that the terms of its final offer merely met the Bowman bid, A&P knew *for a fact* that the final Borden bid was substantially below 'meeting competition' and beat the Bowman bid by a good margin" (Pet. App. 19a, emphasis in original). In so stating, the court simultaneously conceded the meeting competition defense to Borden and then denied it to A&P because of its supposed state of mind—*i.e.,* a belief that it had accepted the lower offer, which was the only basis for the court's assertion that A&P knew "*for a fact*" something clearly not a fact.

When competing offers involve different commodities, services and allowances, a valid comparison requires more than just setting the quoted prices side by side. For example, in *Harbor Banana Distributors, Inc.* v. *FTC,* 499 F.2d 395 (5th Cir. 1974), the Fifth Circuit found it necessary to consider the different methods of delivery. As *Power Replacements Corp.* v.

Air Preheater Co., 356 F.Supp. 872, 898 (E.D.Pa. 1973), stated: "we must do more than make a superficial dollar and cents comparison between the discriminatory price and the assumed competitive price". So here, a true comparison of the economic value of the two bids requires a more comprehensive analysis, taking account of all of the commodities offered as a package by the competing suppliers (not just the private label items), any differences in the products themselves (*e.g.*, Bowman offering a higher butterfat content), and such other economically significant differences as Bowman's willingness to make the products available at the same price under its own advertised label. A&P's evidence included such a comparison, and it showed that the Bowman offer (the legality of which is not in dispute) was, in fact, better than Borden's (A215a-218a, 221a-223a, 280a-282a, 305a-306a, 515a-529a, 942a-993a). If that is so, then two things necessarily follow: Borden's bid was all the more clearly within the meeting competition rule, and A&P's acceptance of it could not conceivably have caused injury to anyone but A&P.

In any event, the Borden bid was at most marginally lower and would have satisfied Borden's responsibility under Section 2(a). In contrast to the authorities cited above, here the Commission suggested that the defense would only have been available to A&P if Borden's final quote had fortuitously exactly matched the bid submitted by Bowman down to the last fraction of a mill. It stated:

> "We assume, *arguendo,* that A&P can assert the defense if the Borden bid did, in fact, *happen* only to meet the Bowman bid." (Pet. App. 43a, emphasis added)

The Commission's recognition that a precise matching could only occur by happenstance—a result not within A&P's control and not to be expected in real life—underscores the absurdity of making liability turn on the occurrence of such a chance event.

C. The *Kroger* Case, If Correctly Decided, Is Inapplicable Here In Any Event.

In attempting to justify depriving A&P of the meeting competition defense, the court below purported to follow *Kroger Co.* v. *FTC,* 438 F.2d 1372 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971). Both this case and *Kroger* involved the sale of products under private label by a dairy attempting to meet competition, but the similarity ends there. Kroger's buyer was offered a 15% discount by Beatrice Foods Company and *misrepresented* to Beatrice that he had already received an offer at a 20% discount. After further misrepresentations by Kroger, Beatrice eventually offered, and Kroger accepted, prices well below the fictitious 20% discount. (In fact, Beatrice had been the low bidder even before its final — still lower — quotation.) The Commission acquitted Beatrice of a Section 2(a) violation, but found Kroger guilty of a Section 2(f) violation.

On appeal, the Sixth Circuit affirmed. Recognizing its departure from the statutory language and prior judicial interpretation, it stated, in an opinion by Mr. Justice Clark:

> "Kroger . . . [contends] that as a matter of law the discharge of Beatrice requires the acquittal of Kroger because there cannot be a violation of section 2(f) without there being one under 2(a). While ordinarily this may be true—a matter we need not and do not pass upon—it is not true under the peculiar circumstances here, where Kroger was found by the Commission to have given 'false price information' to Beatrice as to Broughton's competing bid. . . ." (438 F.2d at 1374)
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> * * *
>
> "The controlling point here is not the 'hard bargaining' nor the 'price levels' but the *misrepresentation* of the [competing] bid, in order to induce a discriminatory price." (438 F.2d 1378, emphasis in original)

In short, the *Kroger* case engrafted a "lying buyer" (or, more precisely, a "fraudulently induced offer") exception on the general rule that § 2(f) liability is wholly dependent on §

2(a) liability.[26] Here, that exception (if indeed it is valid) clearly does not apply. Astonishingly, the court below dismissed the distinction between a buyer's lying (in *Kroger*) and telling the truth (in this case) as "a fine one indeed" (Pet. App. 21a).[27]

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[26] This is confirmed by the Government's brief in opposition to Kroger's petition for a writ of certiorari, which argued:

> "Kroger is not precluded from 'sturdy bargaining' and 'haggling'; it is barred only from affirmatively misrepresenting competitor bids when it has reason to believe that its seller will rely on those misrepresentations and be induced to offer discriminatory prices." (Brief in Opposition, filed July 26, 1971, p. 15)

See also Applebaum, *Fundamentals of Buyer's Violation Under Robinson-Patman Act*, 39 ABA Antitrust L.J. 869, 882 (1970); 40 Cinn. L. Rev. 632 (1971).

While the question need not be decided here, it is petitioner's position that *Kroger* was inconsistent with the plain language of § 2(f) and that the practices shown there should have been enjoined instead under § 5 of the FTC Act (which was not invoked in *Kroger*). *FTC* v. *Sperry and Hutchinson Co.*, 405 U.S. 233 (1972). That approach would harmonize the result in *Kroger* with earlier and later cases holding that an unlawful discrimination "is a condition precedent to a finding of unlawful conduct under § 2(f)". *Harbor Banana Distributors, Inc.* v. *FTC*, 499 F.2d 395, 399 (5th Cir. 1974); *Aviation Specialities, Inc.* v. *United Technologies Corp.*, 568 F.2d 1186, 1191 (5th Cir. 1978); *Rutledge* v. *Electric Hose and Rubber Co.*, 327 F.Supp. 1267, 1276 (C.D. Cal. 1971), *aff'd*, 511 F.2d 668 (9th Cir. 1975).

[27] It said: "the line between affirmative misrepresentation, as in *Kroger*, and the present case, where Borden was told that it was not 'in the ballpark' and that a $50,000 reduction would not be a 'drop in the pocket', is a fine one indeed" (Pet. App. 21a). At the time those statements were made, A&P had a bid from Bowman reflecting savings of $737,000 and a bid from Borden reflecting savings of only $410,000 (A643a-676a, 687a-707a, 772a). Thus, the quoted statements were perfectly true and quite apt.

Moreover, the rationale of *Kroger* does not fit this case for the additional reason that the final Borden bid was truly "responsive to an actual lower bid" (438 F.2d at 1377) which was indisputably well below Borden's initial offer. Perhaps that is why, although the FTC's opinion hinted that it had doubts about whether Borden had a meeting competition defense (Pet. App. 44a & n.19), the Commission made no finding that Borden did not have such a defense.

III.

THE DECISION CONFLICTS WITH THIS COURT'S RULING IN *AUTOMATIC CANTEEN* ON THE COMMISSION'S BURDEN OF SHOWING LACK OF COST JUSTIFICATION.

The court below frankly acknowledged:

> "[T]he Commission did not itself submit a cost study to show the absence of cost justification. A finding of § 2(f) liability, therefore, has been arrived at without a square holding as to the factual absence of cost justification. This seemingly anomalous situation is naturally seized upon by A&P. . . ." (Pet. 24a-25a)[28]

Automatic Canteen held that where (as here) the buyer is served by different methods or buys in different quantities than his competitors, in order to make out a *prima facie* case the Commission must come forward with evidence showing *both* that the price was not cost justified *and* that the buyer knew or should have known this fact. The language of *Automatic Canteen* is clear:

> "If the methods or quantities differ, the Commission must only show that such differences *could not* give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, *and* that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings." (346 U.S. at 80, emphasis added)

Despite this, and the failure of Commission counsel to adduce any evidence of lack of cost justification, the decision below improperly required the buyer to demonstrate affirma-

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[28] At another point, the court mistakenly refers to a "Borden cost study . . . criticized by A&P" (Pet. App. 28a-29a). There was no Borden cost study (Pet. App. 51a, n.25) and none was submitted by the Commission (Pet. App. 24a). The administrative law judge who presided at the hearing did make an effort to satisfy *Automatic Canteen*'s requirements by ruling that certain data prepared by Borden's Mr. Malone showed a lack of cost justification. However, the Commission itself disagreed; it "did not consider those figures as a formal cost study" (Pet. App. 24a-25a, n.11) and refused to credit this data as being accurate (Pet. App. 54a, n.31).

tively his seller's cost justification. It did so in several steps. First, the Commission brushed aside A&P's contention that there was no proof of price discrimination because the allegedly injured customers received additional services and allowances, stating that these differences "are more properly considered in connection with the cost justification defense" (Pet. App. 41a). Next, the FTC fashioned a new and intricate set of rules, as follows:

> (a) The Commission need not prove the seller's costs or show absence of cost justification; it need only produce evidence that the buyer was "reasonably aware" that the prices were not cost justified (Pet. App. 46a).
>
> (b) The buyer then has the burden of proving the negative that "it did not know or could not reasonably have known that the price differential was not cost justified" (Pet. App. 47a).
>
> (c) Alternatively, the buyer "must submit a cost study if it wishes to prevail, which study generally will be held to the same standard as are cost studies offered by sellers" (Pet. App. 47a).
>
> (d) Thus, "the burden of persuasion as to the issue of whether the prices are, in fact, cost justified *rests with the buyer*" (Pet. App. 48a, emphasis added), and "A&P was unsuccessful in establishing its 'cost justification' defense" (Pet. App. 9a).

These rulings are in plain conflict with the sound logic of *Automatic Canteen.* They assume that the FTC can show that the buyer was "reasonably aware" that prices were not cost justified (and require the buyer to prove the contrary) without adducing any evidence that cost justification was in fact lacking. They then assign to the buyer the burden of showing cost justification, years after the event and under the same severe standard of proof required of a seller who has knowledge of his costs. The result is tantamount to reading the defense out of the statute insofar as a buyer is concerned.

The *Automatic Canteen* decision starts with the premise that it is "apparent that the discriminatory price that buyers are

forbidden by § 2(f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act" (346 U.S. at 70); it continues:

> "[A] buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." (346 U.S. at 74)

After thorough analysis, this Court held that counsel supporting the complaint must show *both* lack of cost justification *and* that the buyer knew it, stating that the FTC has "the burden of coming forward with evidence as to costs and the buyer's knowledge thereof" (346 U.S. at 79).[29] In language equally applicable here, the Court found the FTC had not met its burden of proof when:

> "The Commission made no finding negativing the existence of cost savings or stating that whatever cost savings there were did not at least equal price differentials petitioner may have received. It did not make any findings as to petitioner's knowledge of actual cost savings of particular sellers. . . ." (346 U.S. at 66-67)

The Court observed in *dicta* that, where it is shown that the buyer bought in the same quantities as his competition and was served in the same manner but at a substantially lower price — and that he knew those facts — that evidence may be sufficient for a *prima facie* 2(f) case (346 U.S. at 80).[30] In *Automatic Canteen*, however, the methods by which the buyer was served

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[29] Justice Douglas' dissent in *Automatic Canteen* stated: "The Court's construction [of § 2(f)] not only requires the Commission to show that the price discriminations were not justified; it also makes the Commission prove what lay in the buyer's mind" (346 U.S. at 85).

[30] While the facts here are quite different, we submit that the court below misinterpreted *Automatic Canteen* on this point as well. It stated: "Our reading [of the case] does not, however, support the proposition that the Commission must, in all cases, show as part of its *prima facie* case that the prices induced or received by the buyer were not in fact cost justified" (Pet. App. 25a). On the contrary, we read the *dicta* there as saying—not that a showing of absence of cost justification may sometimes be dispensed with—but only that the showing may sometimes consist of something other than a formal cost study (as, for example, when the favored buyer was served in exactly the same way and in the same volume as its competitors so that cost differences could not exist).

differed from his competitors' terms of service. In such a case, even though the buyer knows that he is receiving a substantially lower price (in *Automatic Canteen*, it was up to 33% less), the Court ruled that Commission counsel must nevertheless demonstrate *both* that the price differential was not cost justified *and* the buyer's knowledge of that fact.

There was here abundant evidence that the methods of service and terms of sale to A&P (on both private label and brand label items) differed from those of its competitors. The Commission noted that "there were differences in the way A&P and its competitors were served" (Pet. App. 41a) and that "many of these [competing] stores received more service than A&P" (Pet. App. 48a).[31]

In attempting to justify shifting to the buyer the burden of proving cost justification, the opinions below build on the following fragment from *Automatic Canteen:*

> "[W]e have dealt only with the burden of introducing evidence and not with the burden of persuasion, as to which different considerations *may* apply." (346 U.S. at 82, emphasis added)

The same considerations which were found to require the Commission to carry the burden of going forward also mandate that the Commission carry the burden of persuasion on this issue. "Considerations of fairness and convenience", "the fact that the buyer does not have the required information, and for good reason should not be required to obtain it" (346 U.S. at 78), general antitrust policy, and the specific language of the statute (346 U.S. at 81) require the same result in each instance. The Court's comments on the "elusiveness of cost data" even to the seller himself (346 U.S. at 68), and on the added difficulties faced by a buyer in trying to prove his seller's

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[31] For example, all of the allegedly injured customers selected by Commission counsel in Illinois received full service delivery (A437a-439a, 531a-536a), as did all of the allegedly injured customers in Indiana except one (Wilco Food Center, A531a, 996a) which received merchandising and advertising support, as well as other allowances not accorded to A&P (A357a-361a, 364a-365a, 426a-427a, 881a).

costs (346 U.S. at 69), are applicable *a fortiori* to the buyer's being saddled with the burden of proof. The same is true of the Court's recognition that giving the buyer this burden "would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies" (*Ibid*).[32]

These insights are well illustrated by this case. A&P did not know and could not have known Borden's costs at the time of its purchases because Borden (like sellers generally) considered its costs confidential trade secrets (A1006a).[33] The few figures that Borden passed on to A&P during their negotiations were not intended to show the cost of selling to A&P under the reduced service arrangement, but were actually misleading "sales tools" (*supra*, pp. 5-6). Nevertheless, A&P made a strenuous effort to comply with the extraordinary burden thrust upon it by the trial judge, over eight years after the challenged events. It subpoenaed Borden records and employed accountants who made cost studies with the data then available. The FTC and the court below rejected these studies, pointing out that they "were prepared specifically for purposes of this litigation" (Pet. App. 54a) and were not based on "contempo-

[32] With respect to the relative abilities of the Commission and the buyer to adduce proof as to cost justification, the Court pointedly observed that "the Commission with its broad power of investigation and subpoena, prior to the filing of a complaint, is on a better footing to obtain this information than the buyer. . . . Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified" (346 U.S. at 79).

[33] In addition, there was uncontradicted evidence that actual net prices to volume customers were kept secret by Borden and other dairies (A87a-88a, 470a-471a). Indeed, net prices to other customers were also generally unknown because there were such frequent deviations from any published prices as well as individual discounts and allowances (A377a, 427a-430a, 432a-433a, 439a-444a, 447a-451a, 536a-539a, 548a-549a). The sponsors of the Act never intended the buyer to be liable in such circumstances. Senator Robinson stated that "a penalty is not to be inflicted unless the buyer knows what the seller is doing with respect to other customers". 80 Cong. Rec. 6350-6351 (1936).

raneous" observations by accountants familiar with Borden's procedures.[34]

These were, of course, impossible standards for A&P to meet. The outcome here was the predictable result of placing the burden of showing cost justification — whether it is described as one of introducing evidence or one of persuasion — on the party least likely to be able to discharge it, at hearings in which the buyer and seller were in antagonistic positions and which were not concluded until ten years after the agreement under attack.

We are unaware of any other circuit which has attempted to eviscerate *Automatic Canteen* in this fashion. *Alhambra Motor Parts* v. *FTC*, 309 F.2d 213 (9th Cir. 1962), set aside that portion of a Commission order which held that a price advantage given to a cooperative distributor who performed warehousing operations violated § 2(f). There, the Ninth Circuit, relying on *Automatic Canteen*, stated:

> "[T]he Commission regarded petitioners as having the burden of coming forward with evidence that the price differential was cost-justified. In a section 2(f) case, however, the burden is upon the Commission." (309 F.2d at 218).
>
> * * *
>
> "[S]ince it is established in the evidence that there were these differences in the methods by which manufacturers sold to jobber-members, as compared to independent jobbers, the burden was on the Commission to show that the cost saving could not be commensurate with the price differential." (309 F.2d at 219, footnote omitted).

See also C. Edwards, *The Price Discrimination Law* 512 (1959); Scher, *New Directions in Buyer's Liability Under the Robinson-Patman Act*, 39 ABA Antitrust L.J. 884, 888 (1970); W. Patman, *Complete Guide to the Robinson-Patman Act* 157

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[34] As the court put it: "The A&P [cost] studies were flawed in a variety of respects, many of which were attributable to the preparer's unfamiliarity with Borden's operations in the Chicago area" (Pet. App. 23a).

(1963); C. Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* 163 (2d rev. ed. 1959).

The opinions below rely heavily on *Fred Meyer, Inc.* v. *FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd in part on other grounds*, 390 U.S. 341 (1968). The evidence there showed that Meyer knew that it was purchasing on the same terms and conditions as its competitors except that it was receiving substantial promotional allowances, found to be tailor-made for Meyer and prohibited by Section 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d).[35] As we have already seen, in such a case it is sufficient for the Commission to prove the buyer's awareness that he received a substantial price advantage over competitors who were served in the same way, so that no cost justification was possible. Meyer knew that the allowances to it were unique and amounted to "as much as one-third of the regular price" being charged other customers (359 F.2d at 365). Calling the Commission's evidence "weak but not insufficient" the court concluded that "in the circumstances of this case, [it] is enough to satisfy *Automatic Canteen's* requirement of a cost/price comparison" (*Ibid.*).[36]

In sum, nothing in *Fred Meyer* or elsewhere excuses the Commission's failure to adduce any evidence with respect to the cost differences to Borden between serving A&P and serving the allegedly injured customers. This "seemingly anomalous situation", recognized by the court of appeals, of itself requires reversal and dismissal for failure of proof.

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[35] Meyer operated a chain of supermarkets. Each year it conducted a one-month long promotion in which it offered discounts on particular items featured in Meyer's "coupon books". Participating suppliers paid Meyer in cash discounts or other allowances (359 F.2d at 355-56). Not only was there no comparable program for Meyer's competitors, but Meyer's promotional program was "virtually incapable of being offered on proportionally equal terms" (*Id.* at 360).

[36] The Ninth Circuit in *Fred Meyer* did not indicate any intention to modify its earlier decision in *Alhambra*. More recently, it has affirmed a district court's dismissal of a private action under Section 2(f) in which the lower court stated flatly, relying on *Automatic Canteen:* "There is a burden upon the complaining party to show that the price differential exceeded any cost savings the seller may have enjoyed in sales to the favored buyer." *Rutledge* v. *Electric Hose & Rubber Co.*, 327 F. Supp. 1267, 1277 (C.D. Cal. 1971), *aff'd*, 511 F.2d 668, 678 (9th Cir. 1975).

CONCLUSION

The decision below not only improperly shifts the burden of proof to the buyer; it shears him of all defenses by the outright deprivation of any "meeting competition" defense in a competitive bidding situation and by setting impossible standards for his proof of cost justification. It is irreconcilable with *Automatic Canteen* and the other authorities noted above; it unduly restricts bargaining between buyers and sellers, and deprives purchasers and consumers of the benefits of competition. It is, in short, contrary to the public interest.

Accordingly, we urge that this Court reverse the judgment below and remand those unduly protracted proceedings for dismissal of the FTC's complaint.

Dated: New York, New York
June 5, 1978

Respectfully submitted,

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No. 77-654

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 557 F. 2d 971. The opinion of the Federal Trade Commission (A. 1193a-1235a; excerpts at Pet. App. 35a-57a) is reported at 87 F.T.C. 962, 1047-1073. The decision of the administrative law judge (A. 1067a-1192a) is reported at 87 F.T.C. 962, 967-1046.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1977. A petition for rehearing was denied on August 8, 1977 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on November 7, 1977, and was granted on March 20, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a buyer who knowingly induces and receives a discriminatory price substantially below any competitive offer is shielded from liability under Section 2(f) of the Robinson-Patman Act because the seller offering the lower price may have submitted its bid in a good faith effort to meet competition.

2. Whether, in connection with petitioner's asserted cost justification defense, the Federal Trade Commission properly applied the evidentiary standards set forth by this Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61.

STATEMENT

Petitioner ("A & P") operates a chain of grocery stores. The Federal Trade Commission found (Pet. App. 39a-55a) that under an agreement with Borden, Inc., concluded in November 1965, A & P knowingly induced and received discriminatory prices on milk and other dairy products, in violation of Section 2(f) of the Robinson-Patman Act, 15 U.S.C. 13(f).[1] The

[1] The Robinson-Patman Price Discrimination Act of 1936, 49 Stat. 1526, substantially amended Section 2 of the Clayton

Commission ordered A & P to cease and desist from inducing or accepting unlawfully discriminatory prices in the purchase of such products (Pet. App. 56a), and the court of appeals affirmed (Pet. App. 1a-32a). A & P now challenges that decision.

A. The Negotiations and Agreement

In late 1964, A & P headquarters in New York instructed A & P divisional purchasing officials to investigate the possibility of obtaining reduced prices by switching from brand label milk (*i.e.*, milk bearing a processor's label) to private label milk (*i.e.*, milk bearing the retailer's name or brand) (A. 198a-199a, 294a-296a, 1077a).[2] A & P's Chicago Unit, then a part of the Company's Middle Western Division,[3] contained more than 200 stores in Illinois, Indiana, and Iowa (A. 1071a). Chicago Unit Head Buyer Elmer Schmidt invited Borden to submit a private label offer for the Chicago area, where Borden had served A & P since the late 1950s (A. 1077a, 1079a, 1198a).

Act, 38 Stat. 730. The resulting version of Section 2 is commonly referred to as Section 2 of the Robinson-Patman Act, and that usage is followed here.

[2] In the version of this brief filed in page proofs under this Court's Rule 34(5), the abberviation "FF" was used to refer to the administrative law judge's findings of fact, and relevant testimony in the Commission's hearing transcript was cited by the witness's name followed by the appropriate page number(s). All these citations have been converted to appendix citations in this final version of the brief.

[3] In 1969 A & P abolished the unit-division organizational structure, and the Chicago Unit became one of 32 operating divisions (A.1071a, 1072a-1073a).

Shortly before A & P requested the private label bid, Borden had opened a new dairy processing plant in Woodstock, Illinois (A. 1076a). The new plant, designed to increase Borden's capacity, had been constructed at an investment of more than $5 million (A. 566a, 899a-912a, 1082a).[4] A & P's business represented more than 55 percent of Borden's wholesale route sales in the Chicago area and more than 25 percent of the Woodstock plant's potential production (A. 686a, 1081a-1082a).[5]

Borden officials feared that, if Borden granted lower private label prices to A & P, A & P might reduce retail private label prices below existing retail prices for advertised brand label milk. Borden thought that this would be undesirable (A. 1081a-1082a, 1227a-1228a). Despite this concern, however, Borden believed that retention of A & P's business was essential to the efficient operation of the Woodstock plant (A. 555a-557a, 1079a, 1081a-1083a, 1085a-1086a, 1166a-1167a), and that loss of the A & P account would reduce annual gross profits by more than $1.6 million (A. 1084a, 1085a).[6] Borden was therefore "desperate" to keep A & P's business

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[4] In the page proof version of this brief, the abbreviation "CX" was used to refer to exhibits introduced by the Commission and the abbreviation "RX" to refer to exhibits introduced by A & P (respondent at the administrative hearing). These citations have now been converted to appendix citations.

[5] The Woodstock plant ultimately produced almost all of the private label products sold to A & P (A. 1075a).

[6] The administrative law judge apparently used the term "gross profits" to refer to the amount by which sales exceeded

(A. 1085a-1086a, 1124a), and the president of Borden's Chicago Central District told A & P's representative Schmidt that Borden "could not lose" the A & P account (A. 1086a).

Accordingly, during the period from November 1964 to August 1965 Borden made several private label offers to A & P. Borden successively increased the number of products to be covered by the private label program (A. 1079a-1084a). The August offer covered 11 milk and dairy items and applied to stores throughout A & P's Chicago Unit. The August offer would have permitted A & P to realize annual savings of $410,000 if it switched wholly to private label milk and continued to purchase the same volume (A. 643a-682a, 1084a). Because A & P's annual purchases from Borden were approximately $5.6 million (A. 1101a), this offer represented a reduction of some 7 percent.

During negotiations Borden submitted detailed cost data to A & P in connection with the various private label offers (A. 574a-641a). In its May 1975 offer Borden stressed to A & P that it expected almost no profit from the A & P contract, but that it was presenting such a bid because A & P's business was vital to Borden's efficient use of its Woodstock plant (A. 590a-597a, 1081a, 1082a-1083a).

Borden told A & P that some dairies in the area might submit bids that included only out of pocket

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labor costs and raw material costs. Capital costs, taxes, and other costs therefore must be subtracted from the $1.6 million figure in order to determine Borden's net profit in serving A & P.

or direct costs and omitted all fixed charges (A. 64a-65a, 108a-110a, 1084a, 1085a-1086a). In addition, Borden's Chicago Sales Manager said that he did not "see how anyone can sell any cheaper than Borden" (A. 109a-110a, 1085a). A & P was not satisfied. "[I]t hammered down Borden's successive bids and even when it was informed that the bid was at or close to Borden's costs put the matter up for outside bids" (A. 1101a; see also A. 1084a-1085a).

On August 31, 1965, Bowman Dairy Company submitted an offer that was substantially lower than Borden's August offer and would have produced annual savings of approximately $737,000 for A & P under conditions roughly similar to those offered by Borden (A. 687a-707a, 772a-773a, 1085a, 1089a).[7] Although it is not clear that A & P intended to give serious consideration to the Bowman bid,[8] A & P

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[7] The administrative law judge found that Bowman's offer was not a meaningful competitive bid because the prices quoted depended on certain unjustified assumptions concerning the volume A & P would purchase and the required delivery frequency in the Gary-Hammond area of Indiana (A. 1087a, 1108a-1109a, 1112a-1113a). The Commission reversed this finding and stated that the Bowman bid was genuine and comparable if adjusted "to make it responsive to A & P's true situation" (Pet. App. 43a and n. 17).

[8] The record contains some indication that, in light of its unsatisfactory prior relationship with Bowman, A & P would not have accepted the Bowman bid even if it had been the lowest (A. 1175a-1176a). A & P did not ask Bowman to provide a letter concerning the legality of the prices offered; it did ask Borden for such a letter (A. 1089a, 1109a). Moreover, A & P did not seek to clarify certain aspects of the Bowman bid that would have significantly affected its net costs (see note 12, *infra*).

notified Borden of the existence of a lower competitive offer and, contrary to its past practice, gave Borden the opportunity to rebid (A. 201a-202a). A & P told Borden only that Borden's most recent offer was "not even in the ball park" and that an improvement of $50,000 in the annual savings offered by Borden would "not be a drop in the bucket" (A. 109a-110a, 708a-709a, 1085a).[9]

Borden apparently made no effort to verify whether A & P had received a lower offer. Instead, Borden responded on September 8, 1965, by offering to submit a new quotation that would yield A & P an annual cost reduction of $820,000 (A. 1086a), or twice the savings of the August offer. Borden informed A & P that the offer was made "on the basis of meeting competition" (A. 71a, 72a-73a, 1086a). A & P told Borden that the revised offer was "in the ball park" and asked Borden to prepare a formal quotation spreading the $820,000 savings among the various products in Borden's dairy line (A. 72a-73a, 113a, 1086a).

Borden then submitted a new price proposal covering the 11 items previously offered under the private label program as well as glass gallons of whole milk and lowfat milk (A. 73a-74a, 115a-117a, 1087a). A & P's representative Schmidt rejected this offer on the ground that other bidders had not bid on glass

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[9] Although the parties, the court of appeals, and the Commission have quoted this statement as it appears in the uncorrected transcript (*i.e.*, "a drop in the pocket"), the findings of the administrative law judge quote the witness' actual testimony, as reflected in the corrected transcript.

gallons and that it would not be fair for Borden to allocate part of the $820,000 annual savings to those items (A. 73a-74a, 116a-118a, 1087a).[10] While Borden was preparing a corrected bid that would allocate all of the savings to the original 11 private label items, A & P urged Borden to make further price improvements, saying "sharpen your pencil a little bit because you are not quite there" (A. 117a-118a, 124a-125a, 1087a-1088a, 1151a-1152a, 1199a & n.3). Borden interpreted this to mean that its new offer was not quite as low as the competing offer in A & P's hands, and it consequently reduced its prices further (A. 118a, 124a-125a, 1087a). On the basis of the "sharpen your pencil"remark, the administrative law judge found that "A & P gave false price information to Borden as to Bowman's competing bid" (A. 1151a-1152a).

When Borden presented its final bid to A & P, the president of Borden's Central Division again stated that the offer was being made on a "meeting competition" basis. The Borden official explained to A & P's Schmidt (A. 76a, 1088a; see also A. 119a, 1088a):

> [T]here is certainly something here that I want you to very definitely understand. * * * This price is given to you by us on the feeling and belief that we are meeting a competitive bid.

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[10] The administrative law judge found that Bowman's bid had included glass gallons (A. 1078a). A & P simply did not wish to sell private label milk in glass containers because of the practical problems created by the need to collect deposits, make refunds, and store bottles (A. 257a-260a, 774a-775a).

> We know of no other way to justify this. You have to accept it on that basis. You must make that clear to your superiors and to your legal people. I don't know what may come of this in the future, but I want you to understand this[:] we are going to say always that we felt we were meeting a competitive offer that you had received from someone else.

Schmidt replied (A. 76a, 1088a): "[Y]ou don't need to worry. I read you loud and clear. I understand what you are saying. My superiors and our legal department will understand it." Schmidt admitted that Borden told him on this and other occasions that the final bid was based on a perceived need to meet competition (A. 265a-266a, 268a, 1089a). Borden never gave A & P any reason to believe that its bid could be justified by any difference between the cost of serving A & P and the cost of serving other customers;[11] the Commission found that A & P was aware that there was no such justification (A. 1101a, 1103a-1105a).

A & P itself determined that Borden's offer was "substantially better" and "considerably more attractive" than Bowman's (A. 214a-215a, 304a-305a, 772a-779a, 841a-880a, 1089a, 1121a-1122a). Borden's final bid offered A & P nearly $83,000 in additional annual savings. Borden thus offered annual

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[11] The Commission found, moreover, that many stores competing with A & P were charged a higher price for Borden's milk products even though they bought in greater quantities than the individual A & P stores with which they were competing (A. 1216a).

savings approximately 11 percent greater than those offered by Bowman. The administrative law judge, the Commission, and the court of appeals all rejected A & P's contention that Bowman's offer was as good as or better than Borden's (A. 1112a, 1199a, 1210a & n.16; Pet. App. 4a-5a, 6a, 17a, 19a).[12]

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[12] A & P now attempts to reargue in this Court the relative merits of the Borden and Bowman bids (Br. 7 and n.10, 8 n.12, 10, 11 n.17).

For example, A & P maintains that its decision to accept the Borden offer was based in part on the erroneous assumption that that offer would yield annual savings of $880,000 rather than $820,000 (Br. 11-12 n.17). The record shows, however, that A & P was well aware that the $820,000 figure was the proper one to consider in weighing the Borden bid (A. 736a-737a, 774a-775a), and the administrative law judge found that A & P did consider the correct figure (A. 1089a).

A & P also cites testimony that the savings represented by Bowman's bid were understated by its own officials and the Commission because Bowman proposed to sell milk higher in butterfat content than Borden's milk (Br. 7 n.10). The witness on whom A & P relies (Bowman's General Manager in Chicago) also testified, however, that the Bowman offer did not contain butterfat specifications for a particular percentage (A. 479a-481a), and another witness testified that milk sold by Bowman during 1965 and early 1966 was actually lower in butterfat content than milk sold by Borden during the same period (A. 431a). The administrative law judge expressed "serious doubt that the Bowman bid actually called for 3.5 percent butterfat content" (A. 1124a-1125a); he found that the bid "was based upon a 3.5 percent butterfat content of the Class I raw milk and not the butterfat content of the processed milk" (*ibid.*). The judge also observed that A & P was not interested in butterfat content as long as the minimum legal requirements were met (A. 1124a). On the basis of this record, the Commission concluded that any difference in butterfat content would not have "greatly change[d] the dif-

A & P requested a letter from Borden stating that Borden's quoted prices were available to A & P's

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ference in prices" between Borden and Bowman (Pet. App. 43a n.18). Substantial evidence supports that conclusion.

A & P next contends that the Bowman bid was superior because, unlike Borden, Bowman would not have required A & P to preorder merchandise, would have sold its advertised brand at the same reduced prices offered for private label milk, and would have granted A & P comparable price reductions on dairy products not included within the group of 11 items covered by Borden's bid. As the administrative law judge found (A. 1107a-1108a), consideration of items not covered in the bids is improper because during the critical period in 1965 A & P evinced no interest in such items. Preordering was relatively unimportant because milk suppliers learn by experience the approximate needs of each store (A. 190a-196a). Furthermore, A & P fails to discuss two important respects in which Bowman's bid offered terms less favorable than Borden's; when the Commission adjusted the Bowman bid to take account of these differences, it concluded that "Borden's bid beats Bowman's by an even greater amount" (Pet. App. 43a). In particular, the prices offered by Bowman were dependent on a stated estimate of monthly sales volume and on a delivery schedule requiring deliveries only three days each week in the Gary-Hammond area of Indiana (A. 1108a-1109a; Pet. App. 43a; see note 7, *supra*). A & P's actual monthly purchases for its Chicago Unit totalled only approximately 75 percent of the volume expected by Bowman (A. 1108a-1109a); union contracts and prevailing practice required deliveries six days each week in the Gary-Hammond area (A. 1109a). The Bowman bid explicitly provided that prices would be adjusted if A & P's monthly order did not meet the assumed dollar volume or if labor costs were higher than anticipated (A. 687a-707a, 1108a-1109a). For these reasons, the Commission was justified in concluding that "the Borden bid was substantially better than the Bowman bid" (Pet. App. 43a).

Of course, the most important refutation of A & P's assertions is A & P's own acceptance of the Borden bid. A & P strains credulity when it argues that after months of hard bargaining it mistakenly accepted an inferior bid (Br. 11-13

competitors (A. 261a-265a, 1089a). Borden's response stated only that the quoted prices were "proper" and that Borden would defend them (A. 882a, 1217a). Although A & P's home office executive who reviewed the offer recognized that this letter did not meet A & P's request, he nonetheless approved acceptance of Borden's offer in October 1965 (A. 208a-209a, 220a-221a, 1089a).[13] Borden began serving A & P under the private label arrangement in November 1965 (A. 1089a). The next month Bowman went out of business, selling its assets to a large milk distributor (A. 476a).[14]

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and n.17; A. 218a-219a). The court of appeals correctly approved the Commission's findings that "Bowman's bid was in fact higher than Borden's" and that "A & P knew *for a fact* that the final Borden bid * * * beat the Bowman bid by a good margin" (Pet. App. 17a, 19a). These findings are supported by substantial evidence, and the questions presented by the petition (Pet. 2) do not include any challenge to the Commission's findings of fact. This Court therefore should reject A & P's invitation to engage in a factual review of the record. See *Berenyi* v. *Immigration Director*, 385 U.S. 630; *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214.

[13] In an effort to explain his willingness to proceed without the usual letter of availability, the A & P executive testified that a Borden official in New York told him that the letter sent from Borden's Chicago office (A. 1217a; Pet. Br. 11) was a letter of availability and in fact was "more than a letter of availability" because it was intended to indicate that Borden would "hold A & P harmless" in connection with the private label prices (A. 208a-214a). No such meaning is apparent on the face of the letter, however, and the Borden official in question denied having made the statements attributed to him (A. 185a). The administrative law judge refused to credit A & P's version of these events (A. 1103a, 1121a-1122a).

[14] See *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 601-602.

The Borden—A & P agreement entailed some reduction of services to A & P. Two months after the beginning of the private label service to A & P, Borden extended to other retail customers in the Chicago area the same limited service option (A. 1105a-1106a). The discounts offered to other customers electing reduced services were not as large as those given to A & P (A. 1097a, 1105a-1106a).[15] The administrative law judge found that the discriminatory prices received by A & P were between 6 percent and 22.5 percent lower than the prices paid by A & P's competitors (A. 1093a-1099a, 1183a-1192a).[16]

The administrative law judge determined that,

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[15] Although A & P does not contend that the prices it received were not discriminatory, it does cite testimony from Borden's chief negotiator to the effect that Borden would have sold private label milk to other customers on the same terms and conditions offered to A & P (Br. 11 n.15). Borden's negotiator also testified, however, that he did not know of any instance in which such an offer was actually made to another customer (A. 94a), and A & P has not identified any customer who received equally low prices from Borden. Moreover, as indicated above (see page 4, *supra*), Borden was not eager to encourage the sale of private label milk (A. 1081a-1082a, 1228a), and a Borden official testified that his superior told him not to use the A & P price in the solicitation of other accounts because the A & P price had been offered on a meeting competition basis only (A. 157a-158a, 159a-160a).

[16] A & P suggests (Br. 32 n.33) that it did not know the prices it received from Borden were lower than those at which Borden sold to other customers. This possibility, improbable as a matter of business reality, is contrary to the findings of the administrative law judge (A. 1091a-1101a), adopted by the Commission (A. 1205a-1209a), and affirmed by the court of appeals (Pet. App. 13a-15a).

compared to competitors that also chose Borden's limited service option, "the only benefit lost by A & P in connection with the private label contract was advertising" (A. 1106a). The cost of that advertising to Borden was insufficient to justify the difference between the prices offered to A & P and those offered to other limited service customers (*ibid.*).[17] Furthermore, the Commission concluded on the basis of the administrative law judge's findings (A. 1109a-1110a) that even in those instances where A & P did receive fewer services than other Borden customers, the service savings to Borden were not sufficiently great to justify the price discounts accorded to A & P (Pet. App. 41a, 48a).

The A & P—Borden contract provided that prices were subject to negotiated change to reflect increased costs. In May 1966, in response to an increase in labor and container costs, Borden approached A & P to negotiate an increase in its prices (A. 33a-34a, 148a-151a, 802a, 1090a). Although Borden stated that it had passed increased costs on to other customers in the form of higher prices,[18] A & P refused to accept private label price adjustments (A. 150a-

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[17] Indeed, a Bowman official testified that his company was willing to price private label and advertised label products identically because it could not justify *any* price difference on the basis of advertising cost differences (A. 458a). The official also stated that he had informed A & P of this fact (*ibid.*).

[18] The spring of 1966 saw milk price increases throughout the Nation. See Federal Trade Commission, *Economic Report on Milk and Bread Prices* (1966).

151a, 803a, 841a-1, 1090a). A & P accepted increases on Borden label products, but within a few months private label milk accounted for almost all of A & P's purchases from Borden (A. 835a, 1090a, 1121a). In March 1967, when Borden again asked A & P to accept the same price increases previously accepted by other customers, A & P finally agreed to a limited increase on private label products (A. 152a-157a, 813a-828a, 1090a, 1107a, 1219a). A & P took this step only after it had learned of the Commission's investigation of the private label deal with Borden (A. 1090a, 1175a-1176a). Even then, A & P agreed to an increase that was only some 60 percent of that already accepted by Borden's other customers (A. 1090a, 1107a).[19]

From November 1965 through February 1972 Borden's sales of 11 principal dairy items to A & P's Chicago Unit were approximately $5 million annually (A. 225a-226a, 842a, 1071a, 1101a). Although the $820,000 savings negotiated in 1965 amounted to a discount of some 14 percent from what it otherwise would have paid, A & P did not pass its private label savings on to its retail customers (A. 1100a, 1120a; see also A. 1227a).

B. The Commission's Proceedings

In 1971 the Commission issued a complaint alleging that A & P had induced or received unlawful dis-

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[19] After November 1965, A & P did not receive any offers from competing dairies, and consequently the differential treatment Borden gave to A & P during these price negotiations could not have been justified as necessary to meet competition.

criminatory prices from Borden, in violation of Section 2(f) of the Robinson-Patman Act, 15 U.S.C. 13(f).[20] After a full hearing, the administrative law judge issued an initial decision finding that A & P had violated Section 2(f) (A. 1067a-1192a). We have described above most of the important findings of fact.

The Commission adopted most of the administrative law judge's findings concerning A & P's violation and affirmed. The Commission found that Borden discriminated in price between A & P and A & P's competitors (A. 1206a-1207a), that the discrimination was injurious to competition (A. 1207a-1208a),

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[20] The complaint also included two other counts, neither of which is now at issue. One count alleged that A & P's failure to disclose to Borden that its final offering price was substantially lower than any competitor's price was an unfair act or practice and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45. The other count charged both A & P and Borden with violating Section 5 by combining to stabilize and maintain milk prices. The administrative law judge, finding insufficient proof of a price maintenance agreement, dismissed the latter count (A. 1166a-1168a, 1177a, 1182a), and the Commission affirmed (A. 1225a-1229a). With respect to the first count, the administrative law judge thought that, by failing to inform Borden that its final bid was substantially below Bowman's competing bid, A & P acted unfairly and violated Section 5 (A. 1113a-1115a, 1177a). The Commission disagreed and dismissed the first count of the complaint (Pet. App. 36a-39a). The Commission stated that, in its view, "[t]he imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and * * * contrary to the public interest" (Pet. App. 38a).

and that A & P "knew or should have known that it was a beneficiary of a price discrimination having the requisite harmful competitive effects" (A. 1209a).

The Commission then addressed the two affirmative defenses asserted by A & P. On the basis of its findings that "the Borden bid was substantially better than the Bowman bid" and that A & P had "contemporaneously concluded" as much (A. 1210a), the Commission determined that whether or not Borden could have defended a charge of price discrimination by showing that it gave the price in good faith to meet competition, A & P could not take advantage of Borden's defense, because A & P induced Borden's bid and knew of the bid's superiority (A. 1211a-1212a). Finally, the Commission found that complaint counsel presented sufficient evidence to satisfy the initial burden of establishing A & P's knowledge of the lack of cost justification for Borden's discriminatory prices. A & P in turn failed to present sufficient evidence to demonstrate either that it did not know about the lack of cost justification or that the prices were in fact cost justified (A. 1213a-1225a).[21]

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[21] The Commission entered a remedial order (Pet. App. 56a-57a) that A & P now characterizes as "drastic" (Br. 20). This hyperbole is unwarranted. The court of appeals considered and rejected A & P's challenges to the order (Pet. App. 30a-32a). A & P's petition for certiorari did not raise any question concerning the scope of the order (see Pet. 2), and it is now too late for A & P to challenge its terms. See Rule 40(1)(d)(2) of the Rules of this Court.

C. The Court of Appeals' Opinion

The court of appeals held that substantial evidence supports the Commission's findings that Borden's prices to A & P were substantially below the prices at which Borden offered and sold milk products to competitors of A & P, and that these price discriminations resulted in competitive injury (Pet. App. 13a-15a).[22] The court also upheld the Commission's finding that A & P knew or should have known that Borden had no legal justification for the lower price and thus that A & P was the beneficiary of an unlawful price discrimination (*id.* at 15a-16a).

The court held that the Commission properly rejected A & P's meeting competition defense (Pet. App. 17a-22a). Whether or not Borden made its final offer in a good faith effort to meet Bowman's competitive bid, the court said, "A & P knew *for a fact* that the final Borden bid was substantially below 'meeting competition' and beat the Bowman bid by a good margin" (*id.* at 19a; emphasis in original). Under these circumstances, the court concluded, the meeting competition defense, viewed from the buyer's perspective as properly required by *Kroger Co.* v. *Federal Trade Commission*, 438 F.2d 1372 (C.A. 6), certiorari denied, 404 U.S. 871, must fail.

Finally, the court of appeals held (Pet. App. 22a-30a) that the Commission correctly applied the evidentiary standards established by this Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346

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[22] See also note 12, *supra*.

U.S. 61. The court ruled that the Commission satisfied its obligations "to go forward with some evidence that the buyer knew that the discriminatory prices it was receiving could not be cost justified" (Pet. App. 26a). The court then agreed with the Commission that A & P's response to that evidence was insufficient to show either actual cost justification or lack of knowledge that Borden's prices could not be cost justified (*id.* at 23a-24a, 28a-30a).

SUMMARY OF ARGUMENT

I

A & P argues that the Commission may not find a buyer liable under the Robinson-Patman Act without also finding that a seller violated the statute. A & P contends that Borden offered its private label prices in a good faith effort to meet an equally low competitive bid and that Borden therefore is shielded from Robinson-Patman Act liability by the affirmative defense provided by Section 2(b) of the Act. In such a situation, A & P argues, a buyer that has induced and received a discriminatorily low price cannot be liable, even if it knows that the seller's prices were significantly lower than necessary to meet competition.

A & P is wrong. Where a seller's discriminatorily low price does not just meet competition but in fact beats the prices offered by other sellers, any Section 2(b) defense available to the seller must turn on the seller's good faith. In this case, Borden would not necessarily have been entitled to a good faith meet-

ing competition defense, because it made no attempt to verify the existence and terms of Bowman's competing offer. The Commission, however, assumed *arguendo* that Borden would have been able to establish such a defense and concluded nonetheless that A & P violated Section 2(f). This conclusion is correct because A & P knew the terms of the competing offers and thus could not have entertained its own good faith belief that Borden's private label price only met competition. A seller's good faith defense may not be transferred to a buyer where the buyer induced the seller's good faith belief and knows that belief to be false.

The legislative history of the Robinson-Patman Act supports this position. The Act was passed in 1936 to correct perceived abuses associated with the growth of chain stores, in particular, large grocery chains. Congress deliberately sought to narrow the "meeting competition" defense that had been provided years earlier in the Clayton Act. The new wording of Section 2(b) permits only price discriminations made "in good faith to meet an *equally low* price of a competitor" (emphasis added). Sellers asserting a defense under Section 2(b) may not offer a discriminatory price that intentionally beats competition. By the same token, buyers knowing that a discriminatory price substantially beats competition should not be able to benefit from a seller's good faith (but false) belief that the price only meets competition, especially where that belief has been induced by the buyer itself.

A & P contends that even if, in certain circumstances a seller's good faith meeting competition defense cannot be transferred to a buyer, that rule should apply only where the buyer has induced the seller's good faith belief through an affirmative misrepresentation. As the court of appeals correctly concluded, the principle that a buyer may not take advantage of a seller's good faith defense when the buyer knows the seller's beliefs are false need not be so limited. The critical factor is the buyer's knowledge, not its lying. But even if this Court should conclude that a misrepresentation is a prerequisite for buyer's liability where no seller has been found to have violated the Act, it still should uphold the Commission's decision because A & P engaged in misrepresentation. When Borden offered A & P private label prices that would have resulted in annual savings of $820,000 on A & P's Chicago purchases of milk and dairy products, A & P told Borden to "sharpen your pencil a little bit because you are not quite there" (see page 8, *supra*). This remark created the impression that Borden's prices were not yet as low as Bowman's, when in fact Borden's offer was already better than Bowman's by a substantial margin. The administrative law judge found that "A & P gave false price information to Borden as to Bowman's competing bid" (A. 1151a-1152a), and the Commission adopted that finding. If misrepresentation is a necessary element of A & P's liability, the record demonstrates that misrepresentation occurred.

II

A & P's second challenge to the Commission's decision is based on the evidentiary standards announced by this Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61. A & P argues that *Automatic Canteen* requires the Commission to make an initial showing that Borden's price discrimination was not cost justified; A & P then contends that the Commission failed to introduce sufficient evidence to carry this burden. Contrary to A & P's assertions, the Commission presented substantial evidence to show both that Borden's prices were not cost-justified and that A & P knew it.

Section 2(a) of the Robinson-Patman Act provides that discriminatory prices are not unlawful if they make "only due allowance" for cost savings achieved by a seller in serving a particular customer or customers. Section 2(b) provides that, once the Commission has proved a discrimination in price, "the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section." In *Automatic Canteen* the Commission showed that a buyer had induced and received a discriminatory price; the Commission then argued that this showing alone was sufficient to impose on the buyer the burden of coming forward with evidence that the price was cost justified or that the buyer did not know it was not. This Court disagreed. In view of buyers' limited access to information regarding sellers' costs, the Court held that the Commission bears the initial burden of

introducing evidence that a buyer knew or should have known the discriminatory price it received could not be cost justified.

Automatic Canteen was thus a departure from the apparent command of the statutory language in Section 2(b). The Court stressed, however, that its holding was concerned only with the burden of coming forward with evidence and did not require any specific quantum of proof from the Commission. The Court further stressed that the Commission's burden under *Automatic Canteen* "should not be difficult" to carry (346 U.S. at 79). The Court explained that the Commission could make the necessary showing through the use of circumstantial evidence drawn from the buyer's trade experience, the size of the price discount as compared to the likely cost savings, and the seller's possible representations regarding the lack of cost justification.

The Commission in this case presented ample evidence to show that Borden's prices could not be cost justified and that A & P knew it. The Commission showed first that Borden told A & P its private label bid was offered on a meeting competition basis only and could not be justified on any other ground. The Commission also introduced cost figures that Borden provided to A & P during negotiations. These figures indicated that Borden's costs were almost identical to or higher than the prices at which it was offering milk to A & P. Third, the Commission submitted evidence that other customers who received the same limited service from Borden that A & P did never-

theless paid higher prices than A & P. Finally, the Commission established that Borden did not provide A & P with a requested letter stating that its private label prices were available to other customers.

After such a strong showing by the Commission, it is reasonable to require that A & P come forward with some evidence to rebut the Commission's case. Such a shift in the burden of producing evidence is not contrary to *Automatic Canteen*. The Court in that case did not seek to impose an impossible burden on the Commission, and the "[c]onsiderations of fairness and convenience" (346 U.S. at 78) that motivated the earlier decision support the result reached by the court of appeals here.

ARGUMENT

The Commission found that A & P knowingly induced Borden to give it a discriminatorily low price, a price not available to any other Borden customer. The Commission further found that the discrimination was not justified by any cost savings Borden experienced in serving A & P. Although in the court of appeals A & P raised numerous arguments and objections to the Commission's decision and order, the court rejected these arguments and affirmed the Commission's decision. Despite A & P's attempt to reargue the facts (see notes 12, 15, 16, *supra*), as the case comes to this Court it has been settled that A & P induced and received a discriminatorily low price, which harmed competition. A & P now relies entirely on the fact that Section 2(f) of the Robinson-

Patman Act, in providing that "[i]t shall be unlawful for any person * * * knowingly to induce or receive a discrimination in price which is prohibited by this section," allows buyers to defend by showing that the price discrimination was not "prohibited by this section" because the seller would have had a defense. See *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 70.

A & P first argues that Borden would have had a "meeting competition" defense. Section 2(b) of the Act permits a seller to rebut a prima facie price discrimination case by showing that his lower price was offered to a purchaser "in good faith to meet an equally low price of a competitor." A & P contends that, because Borden submitted its final bid in an effort to meet Bowman's competing bid, A & P's acceptance of Borden's offer cannot have been a knowing receipt of an unlawful discrimination in price, in violation of Section 2(f).

Second, A & P asserts a cost justification defense. Section 2(a) of the Act provides that price differentials are legal if they "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which certain commodities are sold or delivered to certain purchasers. A & P contends that, under the standards announced by this Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, *supra*, the Commission's evidence that Borden's private label prices were not cost justified was insufficient. We address these arguments in turn.

I

A BUYER CANNOT TAKE ADVANTAGE OF A SELLER'S POSSIBLE "MEETING COMPETITION" DEFENSE WHEN THAT DEFENSE TURNS ON A "GOOD FAITH" BELIEF BY THE SELLER THAT THE BUYER KNOWS TO BE FALSE

A. The Meeting Competition Defense Turns On The Good Faith Of The Party Asserting The Defense

1. The "meeting competition" defense established for sellers by Section 2(b) of the Act can be established in two ways. First, the seller may show that its price simply met an "equally low" price offered by a competitor. Second, the seller may show that its price, even if in fact lower than any competitive offer, was granted in a "good faith" belief that the price only matched an equally low price. See generally *United States* v. *United States Gypsum Co.*, No. 76-1560, decided June 29, 1978, slip op. 25-31, 34 n.32. Borden's price to A & P was found by the Commission to have been substantially lower than any other offer to A & P. A & P therefore cannot contend that Borden's price simply met Bowman's. A & P must rely on the second branch of the defense, the "good faith" standard that permits "a somewhat imperfect matching between competing offers" (*id.* at 34 n.32) in recognition of sellers' unavoidable lack of knowledge about the precise terms of offers received by buyers.

Although A & P attempts to create a contrary impression (Br. 20 and n.21, 24-25), it is far from clear that Borden could have established a "good

faith" meeting competition defense if it had been charged with price discrimination. Borden, despite its doubts that any competitor could offer a price lower than that contained in Borden's August 1965 offer, never made any attempt to verify the existence or probable terms of a competing offer (see page 7, *supra*). Although, as the Court held in *Gypsum*, inter-seller price verification is forbidden by the antitrust laws despite its potential usefulness in establishing a defense to charges of price discrimination, and Borden therefore could not have asked Bowman to confirm the terms of its offer to A & P, that does not mean that Borden was at liberty to offer a discriminatorily low price to A & P without making *any* attempt to verify that the price was necessary to meet competition. "[C]asual reliance on uncorroborated reports of buyers or sales representatives without further investigation may not * * * be sufficient to make the requisite showing of good faith" (*Gypsum, supra*, slip op. 28), and the failure of a seller to attempt to verify a price is quite inappropriate where, as here, the seller has its doubts about the buyer's veracity.[23] Nevertheless, the Commission's

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[23] Neither the administrative law judge nor the Commission nor the court of appeals determined that Borden would have been entitled to a good faith meeting competition defense. Indeed, the administrative law judge and the Commission suggested that precisely the opposite might be the case (A. 1151a; Pet. App. 44a and n.19). The Commission stated (Pet. App. 44a n.19):

> We believe that it is very probable that Borden did *not* have such a [good faith meeting competition] defense. To have a meeting competition defense, the record must

rationale in this case does not depend on whether Borden could have made out a "good faith" meeting competition defense, and we therefore assume *arguendo* that, if Borden had been charged by the Commission with giving an unlawful price discrimination, it would have had a good defense.

2. A & P argues that, on this assumption, it must prevail because the buyer does not violate Section 2(f) unless the seller also violates the Act.[24] That argument does not take into account the nature of

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demonstrate the existence of facts which would lead a reasonable and prudent person to conclude that the lower price would, in fact, meet the competitor's price * * *. As noted, Borden had serious doubts concerning whether the competing bid was legal. Specifically, it believed that the other bid only considered direct costs. * * * It should have asked A & P for more information about the competing bid. By not making the request, it was not acting prudently. * * *

[24] A & P argues that a finding by the Commission of seller's liability under Section 2(a) is a prerequisite to a finding of buyer's liability under Section 2(f), but it does not contend that the Commission was required to join Borden in the proceeding against A & P. Previous decisions of this Court establish that the Commission enjoys broad discretion in choosing the targets of its enforcement efforts, and the Commission acted within that discretion in deciding not to issue a complaint against Borden for a violation of Section 2(a). See *Automatic Canteen Co.* v. *Federal Trade Commission, supra,* 346 U.S. at 79; *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 249-252; *Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 413. Should this Court agree with A & P that buyer's liability under Section 2(f) is derivative only, the appropriate relief would be remand to the Commission for a determination on the availability of a Section 2(b) meeting competition defense to Borden.

the "good faith" requirement of the meeting competition defense. The Act makes uniform prices to competing customers the rule, and discrimination is an exception that must be justified under strict standards. *Exxon Corp.* v. *Governor of Maryland*, No. 77-10, decided June 14, 1978, slip op. 10-15. The seller has the burden of showing its good faith if the sale in fact is at a price lower than any competing offer. *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746, 759-760. The requirement of good faith "lies at the core of the meeting-competition defense" (*Gypsum, supra*, slip op. 29); without an effective requirement of good faith, the meeting competition defense would swallow the general rule against price discrimination.

The rationale for having a meeting competition defense is the recognition that, as a matter of competitive reality, sellers will make sales on the best terms they can get in light of competitive offers (see *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 249). A "seller may well find it essential, as a matter of business survival, to meet [a competitive] price rather than to lose the customer" (*ibid.*). Moreover, sellers cannot be expected to have perfect knowledge of the offers received by buyers, and the statute thus tolerates less than perfect matching. *Gypsum, supra*, slip op. 26-28, 31-34 and n.32. But the purpose of accommodating the basic statutory requirement of uniform pricing to the demands of competitive reality and seller ignorance would not be served by allowing buyers to take advantage of sell-

er's good faith belief that a price reduction is necessary to meet competition. Buyers, after all, are not ignorant of the competing offers and do not need the protection offered to sellers. That is why, as the Court stated in *Automatic Canteen, supra*, 346 U.S. at 78 n.21, "[a] buyer knowing he is receiving a lower price cannot be said to be in the same position as a seller granting a lower price."

A & P's reading of the Act would allow a buyer to create a defense for itself by the very inducement that Congress sought to proscribe. It could persuade a seller that a discriminatorily low price was necessary to meet competition and then rely on the seller's mistaken impression as a defense. Such an interpretation of the Act would permit a buyer operating with full knowledge to profit by a seller's good faith mistake—a mistake that the buyer may well have induced or encouraged. This would defeat the essential purposes of Section 2(f). Yet, as the Court explained in *Automatic Canteen, supra*, 346 U.S. at 63, Section 2(f) "is a vital prohibition in the enforcement scheme of the Act." And, as *Automatic Canteen* demonstrates in connection with the cost justification defense, sellers and buyers may be treated differently under the Act if their different commercial roles make such a course appropriate.

Moreover, this Court has recognized that "sustained enforcement of § 2(f) * * * [may] serve to bolster the credibility of buyer's representations and render reliance thereon by sellers a more reasonable and secure predicate for a finding of good faith under

§ 2(b)." *Gypsum, supra,* slip op. 30 n.30. Effective enforcement of Section 2(f) would reduce sellers' perceived need for interseller price verification as a means of establishing a good faith meeting competition defense. Sellers would derive no comfort from the position A & P asserts, however, for if that approach were accepted buyers always would have an incentive to mislead sellers. Sellers then would need to rely on other methods of "verifying" buyers' representations and, as the Court held in *Gypsum,* some kinds of verification create the prospect of reduction in competition among sellers (slip op. 31-34). Accordingly, an interpretation of Section 2(f) that would allow buyers to take advantage of sellers' good faith would undermine antitrust concerns as well as the policies of the Robinson-Patman Act.

We submit, therefore, that Section 2(f) "prohibits inducing prices which would be illegal under [Section] 2(a) from the seller's point of view if the seller knew all that the buyer knows but has not told him." Curtis, *Buyer Liability Under the Robinson-Patman Act,* 42 A.B.A. Antitrust L.J. 345, 354 (1973). As Mr. Justice Clark, a member of the majority in *Automatic Canteen,* explained in the court of appeals' opinion in *Kroger Co.* v. *Federal Trade Commission,* 438 F. 2d 1372 (C.A. 6), certiorari denied, 404 U.S. 871, "[i]n order for the buyer to be sheltered through the exoneration of the seller under section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer"

(*id.* at 1377). On the one hand, "a buyer may not be prosecuted for inducing discriminatory prices which it knows a seller may offer with impunity under section 2(b)" (*id.* at 1376). But, by the same token, "the seller's successful defense under § 2(b) cannot exculpate the buyer [if the buyer] knew that the prices offered by [the seller] * * * were not in fact within the defense of section 2(b)" (*id.* at 1377), for then the buyer cannot have the same "good faith" possessed by the seller. "To hold otherwise * * * would put a premium on the buyer's artifice and cunning in inducing discriminatory prices" (*ibid.*).[25]

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[25] A & P cites three cases (Br. 27 n.26) that it asserts discredit the result in *Kroger*. These cases are readily distinguishable and do not hold or even suggest that the finding of buyer's liability in *Kroger* was improper. In *Aviation Specialties, Inc.* v. *United Technologies Corp.*, 568 F.2d 1186, 1191 (C.A. 5), the court of appeals decided that the Robinson-Patman Act was inapplicable because the repair service contracts at issue did not involve the sale of a commodity within the meaning of Section 2(a). In *Rutledge* v. *Electronic Hose & Rubber Co.*, 327 F. Supp. 1267, 1275 (C.D. Cal.), affirmed, 511 F.2d 668, 677 (C.A. 9), plaintiffs failed to present adequate proof that any price discrimination had occurred and, accordingly, there could be no Robinson-Patman liability for either buyer or seller. Finally, in *Harbor Banana Distributors, Inc.* v. *Federal Trade Commission*, 499 F.2d 395, 398-399 (C.A. 5), the court of appeals found that the challenged price and service terms did not beat competition and indeed may not even have been favorable enough to meet competition. Unlike the buyers in *Kroger* and the present case, the buyer in *Harbor Banana* did not accept an offer substantially better than the next best competitive bid, and the seller thus was not required to assert the "good faith" component of the meeting competition defense.

B. The Legislative History Of The Robinson-Patman Act Supports The Principle That Buyers Cannot Take Advantage Of Sellers' Good Faith (But False) Belief That Their Prices Simply Meet Competition

Our argument to this point has emphasized the structure of the Robinson-Patman Act and its judicial interpretation. The legislative history also supports the Commission's position that buyers charged with violating Section 2(f) cannot rely on their sellers' good faith meeting competition defense, where the buyers know that the sellers' beliefs are false and that the discriminatorily low prices offered not only met but substantially beat competition.

The Robinson-Patman Act was intended in major part to correct perceived abuses associated with the growth of chain stores at the time of its enactment in 1936. Large grocery chains in particular were accused of using their substantial buying power to extract special concessions from suppliers and thereby to upset conventional channels of merchandise distribution. See *Exxon Corp.* v. *Governor of Maryland*, *supra*, slip op. 14 n. 25; *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168-169; F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 8-14 (1962); W. Patman, *Complete Guide to the Robinson-Patman Act* 7-10 (1963); Fulda, *Food Distribution in the United States: The Struggle Between Independents and Chains*, 99 U. Pa. L. Rev. 1051 (1951); Federal Trade Commission, Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935). The price discrimination provisions of the Clayton Act did not effectively

deal with the chain stores' practices because they did not reach price discriminations "made in good faith to meet competition." 38 Stat. 730.

The House Judiciary Committee thought that this language unwisely authorized sellers to cut their normal prices below prices offered by a competitor. Accordingly, the committee proposed the revised wording now found in Section 2(b) of the Robinson-Patman Act. Under this provision, sellers may rebut a charge of unlawful price discrimination by showing that their reductions in price to a particular customer were offered "in good faith to meet an equally low price of a competitor." As the Judiciary Committee explained, Section 2(b) "does not permit [a seller] to cut local prices until his competition has first offered lower prices, and then he can go no further than to meet those prices. * * * [T]he proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936). The counterpart Senate bill retained the original Clayton Act meeting competition formula (see 80 Cong. Rec. 6426, 6433, 6435 (1936)), but the new and narrower House version, permitting sellers to meet only "equally low" competitive prices, prevailed at conference. The Conference Committee Report noted that the Senate's "language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act." H.R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936). See generally F. Rowe, *supra*, at 212-213.

In adopting the Robinson-Patman Act meeting competition proviso, then, Congress unmistakably sought to sanction only those discriminatory prices offered to meet equally low prices of a competitor.[26] The specific purpose of the statutory revision was to exclude from the proviso's protection price cuts that *beat* competitive offers. While proponents of legislative reform may of course question the wisdom of that decision, Robinson-Patman Act litigants cannot deny the congressional intent underlying Section 2(b). Congress left even the limited good faith defense in place only as an acknowledgement of the difficult competitive decisions that may face sellers (see page 29, *supra; Standard Oil Co.* v. *Federal Trade Commission, supra,* 340 U.S. at 249). In light of this background, it would be incongruous to permit a chain-store buyer to accept a non-cost-justified discriminatory price offer that it *knows* is substantially below any competing bid and thus could be justified (from the seller's point of view) only by good faith ignorance of the truth.[27]

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[26] This Court has recently confirmed that the current version of Section 2(b) "narrowed the good-faith defense that had previously existed." *Exxon Corp.* v. *Governor of Maryland, supra,* slip op. 13 and n.23. See also *Standard Oil Co.* v. *Federal Trade Commission, supra,* 340 U.S. at 247-249 and n.14.

[27] As this Court has said in a slightly different context, "[a] buyer knowing he is receiving a lower price cannot be said to be in the same position as a seller granting a lower price." *Automatic Canteen Co.* v. *Federal Trade Commission, supra,* 346 U.S. at 78 n.21. The Court on that occasion acknowledged that evidence regarding the meeting competition

A & P's real complaint then is with the Robinson-Patman Act itself. The Act was intended to limit the bargaining power of large buyers and thereby to curb the growing influence of chain stores. It "reflect[s] a policy choice favoring the interest in equal treatment of all customers over the interest in allowing sellers freedom to make selective competitive decisions." *Exxon Corp.* v. *Governor of Maryland*, *supra*, slip op. 14. Persons disagreeing with that policy choice must seek redress from Congress, not the courts.

C. Even If Misrepresentation By The Buyer Is A Prerequisite To Section 2(f) Liability Where The Seller Has A Good Faith Meeting Competition Defense, The Commission Correctly Found That A & P Violated The Statute In This Case

A & P argues (Br. 26-27) that even if the Court should accept the principle that a buyer may not take advantage of the seller's good faith meeting competition defense when the buyer knows the seller's beliefs to be false, the Court should limit the principle's application to cases in which the buyer affirmatively misrepresented the price offered by a competitor. In A & P's view, the Sixth Circuit's holding in *Kroger* (see pages 31-32, *supra*) covers only such cases.[28] Any

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defense may be more readily available to a buyer than to a seller. See 346 U.S. at 79 n.23.

[28] Notwithstanding A & P's contention, it is not at all clear that the *Kroger* court would have decided the present case differently than the court of appeals. *Kroger* plainly involved a lying buyer, and the court of appeals there did not explicitly consider what result it would have reached had this element of

other rule, A & P maintains, would discourage aggressive bargaining over prices to the detriment of competition. There are two answers to this position.

First, A & P engaged in misrepresentation, so it would remain liable under Section 2(f) even if this Court were to endorse its proposed modification of the *Kroger* rule. In September 1965, after Borden revised its private label bid and offered A & P's Chicago Unit $820,000 in annual savings on milk and dairy products, A & P told Borden to "sharpen your pencil a little bit because you are not quite there" (A. 117a-118a, 124a-125a, 1087a, 1151a-1152a). Interpreting this statement as an indication that its bid was not yet equal to or below its competitor's, Borden reduced its price somewhat further (A. 1087a). The administrative law judge found that "A & P gave false price information to Borden as to Bowman's competing bid. * * * A & P represented to Borden that Bowman's bid was lower than Borden's when, as a matter of fact, A & P itself understood Bowman's bid to be higher than Borden's" (A. 1152a).[29] The

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the buyer's conduct been missing. The Sixth Circuit's opinion in *Kroger* focused not so much on the buyer's misrepresentation as on the fact that the buyer knew that the seller's bid was considerably lower than necessary to meet competition. See 438 F.2d at 1376-1377.

[29] A & P also misrepresented facts concerning its request that Borden exclude glass gallons of milk and lowfat milk from the September 1965 revised bid. A & P told Borden that the competing bid did not include glass gallons and that, to permit a fair comparison, Borden should spread the proposed $820,000 annual savings over only the 11 milk and dairy products covered by Borden's first offer. In fact, Bowman's

Commission adopted this finding (A. 1193a-1194a, 1197a, 1199a n.3, 1200a n.5),[30] and the court of ap-

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bid did include glass gallons, and A & P sought to have the item eliminated from Borden's bid simply to avoid practical inconveniences associated with the sale of private label milk in glass containers (see pages 7-8, *supra*, and note 10).

[30] The Commission characterized A & P's misrepresentation as "not relevant" to the charge that A & P violated Section 5 of the Federal Trade Commission Act by failing to inform Borden that its bid was lower than Bowman's (A. 1200a n.5). Although the Commission agreed with complaint counsel that "A & P was the 'principal malefactor' in the negotiations with Borden" (A. 1211a), the Commission did not mention the misrepresentation in the portion of its opinion dealing with the charge that A & P knowingly received a discriminatory price, in violation of Section 2(f) of the Robinson-Patman Act (A. 1203a-1225a).

In the court of appeals, A & P initially did not discuss the misrepresentation, apparently because it believed the Commission had found the "sharpen your pencil" remark not relevant to the Section 2(f) count as well as the Section 5 count (see A & P Br. in the court of appeals at 28 n.28). In its reply brief, A & P attempted to refute the administrative law judge's findings concerning the misrepresentation; in addition, citing *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196, A & P argued that the court of appeals could not affirm the Commission in reliance on A & P's misrepresentation, because the Commission itself had not relied on the misrepresentation in reaching its decision (Reply Br. in the court of appeals at 4-6 and n.6). Believing that A & P is liable under Section 2(f) whether or not A & P technically lied to Borden, the court of appeals affirmed without referring to the "sharpen your pencil" remark.

If this Court should determine that, where the seller is not found to have violated Section 2(a), only a lying buyer may be found liable under Section 2(f), it should still affirm the Commission's decision on the basis of A & P's misrepresentation. See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8. It would not be necessary to remand the

peals did not disturb it. A & P's misrepresentation was made before final agreement between the parties at a time when Borden remained free to withdraw its bid (see A. 1232a). Thus, A & P did lie about a competitor's offer, and if an affirmative misrepresentation is a prerequisite for A & P's liability under

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case to the Commission. The administrative law judge made an unmistakable finding of misrepresentation (A. 1087a, 1151a-1152a) and the Commission adopted that finding (A. 1197a, 1199a n.3). Notwithstanding A & P's effort in its court of appeals reply brief to minimize the significance of the "sharpen your pencil" remark, the misrepresentation was material because it indicated to Borden that the revised bid was nearly identical to (but not yet as low as) Bowman's competing offer, and indeed that further price cuts were required if Borden hoped to obtain A & P's private label business. Without elaborating on A & P's misrepresentation, the Commission ruled that A & P knowingly induced and received an unlawful discriminatory price; the result would not change if the Commission were to be instructed that liability could attach only if A & P lied in order to achieve its ends.

This Court's decisions in *Chenery* (see also 318 U.S. 80) do not compel remand where it is clear that the agency would reach the same result, were it to apply the proper legal standard, and where the agency has already explained its views and made adequate findings, supported by substantial record evidence, to sustain that result under the correct standard. As Judge Friendly has written, "*Chenery* does not mean that any assignment of a wrong reason calls for reversal and remand; this is necessary only when the reviewing court concludes there is a significant chance that but for the error the agency might have reached a different result. In the absence of such a possibility, affirmance entails neither an improper judicial invasion of the administrative province nor a dispensation of the agency from its normal responsibility." Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L. J. 199, 211. See also *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (plurality opinion).

the circumstances here presented, the record adequately establishes that such a misrepresentation occurred.

Second, A & P's concern about the effect of the decision below on aggressive bargaining is unwarranted because the Commission's position, and the holding of the court in *Kroger*, do not "impose on buyers a duty to disclose competitive prices" (A & P Br. 18). Buyer liability under Section 2(f) depends on the conjunction of (1) a discriminatory price, (2) the buyer's knowledge that the price is unjustifiably discriminatory, and (3) actual harm to competition. A buyer that merely solicits bids and accepts the lowest offer would not violate Section 2(f); something more is necessary. The Robinson-Patman Act demands a showing of competitive injury as a prerequisite to a finding that a particular inducement or receipt of a discriminatory price is unlawful. The Act thus provides a built-in guarantee that enforcement of Section 2(f) will not produce anticompetitive effects. Here the course of dealings between A & P and Borden clearly established A & P's intent to obtain a discriminatorily low price, A & P's knowledge of the discrimination, and the lack of any justification for the discrimination.[31] The spectre of exposing buy-

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[31] To avoid liability under Section 2(f), buyers may seek assurance that the price offered to them is not discriminatory. A & P, apparently recognizing the efficacy of this technique, sought assurance from Borden that Borden's price was available to other buyers. Borden, however, did not provide the requested assurance, and A & P nevertheless accepted Borden's offer (see page 12 and note 13, *supra*).

ers to liability for engaging in ordinary business practices simply is not presented here.[32]

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[32] A & P contends (Br. 14, 18) that the Commission's disposition of Count I of the administrative complaint is inconsistent with its disposition of the Section 2(f) charge in Count II. Count I alleged that A & P's failure to inform Borden that Borden's final offer was substantially below all competing bids constituted an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act (see note 20, *supra*). The Commission dimsised this count, reasoning that an affirmative duty to disclose the terms of competing bids would be contrary to normal business practice and would not serve the public interest (Pet. App. 36a-39a). A & P maintains that the Commission's contemporaneous finding of liability for knowingly inducing and receiving an unlawful discriminatory price is based on the same conduct alleged in Count I and is equally contrary to the public interest. A & P is wrong. Proof of the Section 2(f) violation charged in Count II entailed much more than a simple showing that A & P silently accepted a bid below competition. While such a showing would have been adequate to sustain the Count I charge had the Commission embraced complaint counsel's view of Section 5, proof of the Section 2(f) violation also involved evidence that A & P, having actively induced Borden's bid, deliberately accepted a discriminatory price that it knew could not be cost-justified. The Commission's order under Section 2(f) does not require a buyer to inform a seller whenever the latter's bid beats competition. Buyers in general, and A & P in particular, remain free to accept any offer available to all customers of the seller, and they also remain free to accept even discriminatory price offers unless they know or have reason to know that the discrimination exists and cannot be cost justified.

II

THE COMMISSION ESTABLISHED BY SUBSTANTIAL EVIDENCE THAT BORDEN'S DISCRIMINATORY PRICE WAS NOT JUSTIFIED BY COST SAVINGS ACHIEVED IN SERVING A & P

A. Introduction

Section 2(a) of the Robinson-Patman Act gives sellers a defense to a charge of price discrimination if the discriminatorily low price makes "only due allowance" for cost savings achieved by a seller in serving a particular customer or customers. Section 2(b) of the Act provides that, once the Commission proves that price discrimination has occurred, "the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, held that a seller bears the entire burden of establishing a cost justification for a discriminatory price; the Commission presents a prima facie case simply by proving that a seller has sold to competing customers at different prices.

In *Automatic Canteen Co.* v. *Federal Trade Commission*, *supra*, the Commission's complaint charged a large buyer with knowingly receiving an unlawful discriminatory price, the effect of which may have been to injure competition. 46 F.T.C. 861, 895-896. Applying to the buyer the same allocation of burdens that *Morton Salt* had applied to sellers, the Commission then decided that, to rebut such a prima facie case, a buyer claiming a cost justification defense

must introduce evidence to show either that the discriminatory price was in fact cost justified or that the buyer had no reason to know it could not be cost justified. *Ibid.* Stressing the difference between a buyer's and a seller's access to information concerning the seller's costs, this Court reversed and held that, in a Section 2(f) proceeding, the Commission must present evidence to show the buyer knew or should have known a cost justification defense was unavailable (346 U.S. at 78-82).

A & P now contends (Br. 28-34) that both the Commission and the court of appeals have misinterpreted *Automatic Canteen.* A & P apparently does not contest the adequacy of the Commission's proof or its assessment of A & P's rebuttal evidence.[33]

A & P complains in particular (Br. 29), however, about the Commission's statement that, under *Automatic Canteen,* the "Commission must present evidence to demonstrate that the buyer was reasonably aware that the price differential could not be cost justified" (Pet. App. 46a-47a). In A & P's view (Br. 29), this shows that the Commission proceeded on the assumption "that the F.T.C. can show that the buyer was 'reasonably aware' that prices were not cost justified * * * without adducing any evidence

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[33] The court of appeals correctly concluded (Pet. App. 16a, 23a-24a, 27a, 28a-30a) that the Commission's factual determinations on these points are supported by substantial evidence. There is no reason to review that decision here. See *Mobil Oil Corp.* v. *Federal Power Commission,* 417 U.S. 283, 309-310.

that cost justification was in fact lacking." The Commission, however, made no such assumption.

The Commission concluded that "complaint counsel fully established a *prima facie* case that A & P knew or should have known that the prices Borden charged it for private label products was [*sic*] not cost justified" (Pet. App. 52a). The court of appeals agreed that "the Commission showed, through substantial evidence * * * that A & P knew or reasonably should have known that the final price concessions it received from Borden were not cost justified" (Pet. App. 27a). Read in context, then, the "reasonably aware" phrasing to which A & P objects is merely a restatement of the "knew or should have known" formula advocated by A & P itself (Br. 28). Moreover, as a general rule in Section 2(f) proceedings the Commission is entitled to focus on the buyer's knowledge of the extent of possible cost justifications because as a logical matter, proof that a person knows a proposition to be true always rests on at least some evidence that the proposition is in fact true. This case illustrates that point. Much of the evidence introduced by the Commission to show A & P's knowledge of the lack of cost justification for Borden's bid served simultaneously to demonstrate that that bid could not have been cost justified. A & P thus is wrong in asserting that the Commission failed "to adduce any evidence of lack of cost justification" (Br. 28), and A & P is logically inconsistent in making that assertion while at the same time not challenging the Commission's conclusion that A & P knew or should have known that Borden's offer could not be cost justified.

B. *Automatic Canteen* Does Not Require The Commission To Present Direct Evidence Of The Seller's Costs

1. *The Automatic Canteen holding*

Two principal cases discuss the Commission's burden of proof in cost justification disputes.[34] The first is *Federal Trade Commission* v. *Morton Salt Co.*, *supra*. The Commission charged a seller with illegal price discrimination; the Court held that, under Section 2(b), the Commission need not produce evidence that the seller's quantity discounts are not cost justified. Rather, the Court said, a seller shown to have discriminated in price must bear the burden of proving cost justification. Specifically relying on *Morton Salt* (see 46 F.T.C. at 896), the Commission promptly held in *Automatic Canteen* that a buyer shown to have received a discriminatory price must bear a similar burden. The Commission reasoned that Section 2(b) does not distinguish between buyers and sellers and imposes equally on any alleged Robinson-Patman Act violator the burden of establishing a cost justification defense.

This Court disagreed, holding that "[c]onsiderations of fairness and convenience" require different evidentiary rules for buyers and sellers (346 U.S. at 78-79). Observing first that buyers ordinarily are not privy to information regarding their sellers' costs, and second, that the Commission enjoys a "broad

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[34] The term "burden of proof" is used here to comprehend both the burden of going forward with evidence and the burden of persuasion. See 9 J. Wigmore, *Evidence* §§ 2485-2489 (3d ed. 1940).

power of investigation and subpoena," the Court decided that the buyer does not bear "the burden of coming forward with evidence as to costs and the buyer's knowledge thereof" until the Commission first has made a demonstration sufficient to shift the burden (346 U.S. at 79; footnote omitted). The Court then summarized (346 U.S. at 80) ways in which the Commission could satisfy its evidentiary requirements after introducing proof that a buyer has received a discriminatory price.

> The Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings.

Four important points need to be made about *Automatic Canteen*. First, the Court's decision represented a departure from the result that might have been expected solely on the basis of the statutory language. Section 2(b) provides that once a discrimination in price has been proven, "the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section." This sentence seemingly applies not to sellers alone, but rather to all "per-

son[s] charged with a violation of [Section 2]," including buyers. Neither Section 2(b) nor any other provision in the Robinson-Patman Act suggests that different evidentiary rules should apply to buyers and sellers. The Court in *Automatic Canteen* acknowledged the argument that the inclusive language of Section 2(b) requires buyers to bear the same burden of showing cost justification as sellers (see 346 U.S. at 77-78); nevertheless, the Court held that, in a Section 2(f) proceeding, "[c]onsiderations of fairness and convenience" require the Commission initially to present some evidence on the lack of cost justification and the buyer's knowledge thereof. This ruling, itself a modification of the apparent commands of Section 2(b), should not now be interpreted to make the Commission's evidentiary burden even more onerous than under the court of appeals' reading of *Automatic Canteen.*

Second, the Court's 1953 decision concerned only the burden of coming forward with evidence, not the burden of persuasion. The Court emphasized this feature of its decision and explicitly eschewed any comment on the burden of persuasion (346 U.S. at 65, 74-75, 79, 81, 82). With respect to the latter issue, the Court cautioned that "different considerations may apply" (*id.* at 82). The critical sentences from the Court's opinion, reproduced above, must be read in this light. When the *Automatic Canteen* Court said that the Commission must show that any differences in methods of service or quantities purchased could not give rise to sufficient cost savings

to justify the price discount received by a particular buyer, the Court meant that the Commission must introduce at least enough evidence to make an initial demonstration of the buyer's knowledge of the lack of cost justification. That was as far as the Court needed to go in *Automatic Canteen*, for there the Commission had introduced no evidence at all about the seller's costs. The Court properly refrained from requiring the Commission to prove lack of cost justification by some specific quantum of evidence.

Third, in reversing the Commission's ruling in *Automatic Canteen*, the Court took pains to remark that the initial showing required of the Commission "should not be difficult" (346 U.S. at 79). The Court reinforced this point later in the same paragraph when it wrote that "the Commission must *only* show" that cost savings could not have been sufficient to justify price discounts and that the buyer should have known it (*id.* at 80; emphasis supplied). Given the Court's recognition of the difficulties associated with proving either the presence or absence of cost justification (346 U.S. at 68-69), its statements about the nature of the burden it was imposing on the Commission refute any implication that the Commission must satisfy unusually stringent evidentiary requirements under Section 2(f).

Fourth, the Court gave examples of the kinds of evidence that may be adduced by the Commission in fulfilling its evidentiary obligations. By its references to a buyer's trade experience, size of price discount as compared to cost savings, and possible rep-

resentations by a seller regarding the lack of cost justification (346 U.S. at 79-80 and n.24), the Court's opinion leaves little doubt that the Commission can establish a prima facie case of buyer's liability without introducing formal studies of a seller's costs.[35] Indeed, A & P concedes (Br. 30 n.30) that the Commission need not present a formal cost study in order to carry its burden of going forward under *Automatic Canteen*. Like the first three features of the Court's decision discussed above, this treatment of the evidence on which the Commission may rely in building a prima facie case under Section 2(f) demonstrates the limits of the holding in *Automatic Canteen*. The Court sought to fashion a reasonable allocation of the initial burden based on "[c]onsiderations of fairness and convenience" (346 U.S. at 78). It disavowed any intention to prevent future enforcement of the Robinson-Patman Act against large buyers.

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[35] As one prominent member of the antitrust defense bar has written, "*Automatic Canteen* made it clear that such cost studies are not needed when an inference can be drawn by the introduction of other evidence that cost justification is absent." H. Shniderman, *Price Discrimination in Perspective* 145 (1977). See also Applebaum, *Fundamentals of Buyers' Violation Under Robinson-Patman Act*, 39 A.B.A. Antitrust L. J. 869, 872-873 (1970).

2. *The Commission's development of procedures to implement Automatic Canteen*

After a period in which it issued few complaints under Section 2(f),[36] the Commission began to develop detailed allocations of the burdens of persuasion and introduction of evidence. Beginning with two 1959 decisions involving buying groups of automotive parts distributors, the Commission took the position that its burden of going forward under Section 2(f) may be satisfied by evidence that particular price discounts "necessarily bear relation to factors other than actual costs of production, sale or delivery" and that the buyers who received the discounts were or should have been aware of that fact. See *D & N Auto Parts Co.*, 55 F.T.C. 1279, 1300-1301, affirmed *sub nom. Mid-South Distributors v. Federal Trade Commission*, 287 F. 2d 512, 517-519 (C.A. 5), certiorari denied, 368 U.S. 838; *American Motor Specialties Co.*, 55 F.T.C. 1430, 1445-1446, affirmed, 278 F. 2d 225, 228-229 (C.A. 2), certiorari denied, 364 U.S. 884. The court of appeals in *Mid-South Distributors* confirmed that *Automatic Canteen* should not be read to require the Commission to introduce direct evidence of a seller's costs. The court stated (287 F. 2d at 517-518):

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[36] See F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 441-442 and n.107, 537 (1962); Applebaum, *supra*, note 35, 39 A.B.A. Antitrust L. J. at 873; Frey, *The Evidentiary Burden on Affirmative Defenses Under Section 2(f) of the Robinson-Patman Act:* Automatic Canteen *Revisited*, 36 Geo. Wash. L. Rev. 347, 353 (1967).

> [The *Automatic Canteen*] opinion reflects an awareness that this critical knowledge of the buyer as to both (a) the underlying facts constituting the asserted justification and (b) the conclusion that it would not legally constitute a justification may have to be established from indirect circumstantial inferences. Rarely will buyers have committed the crudities to permit categorical and direct proof.

See also *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104, 110 (C.A. 2), certiorari denied, 371 U.S. 824 (circumstantial evidence sufficient to prove buyer's knowledge in proceeding under Section 5 of the Federal Trade Commission Act).

Since *Automatic Canteen*, the leading decision dealing with a buyer's cost justification defense is *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351 (C.A. 9), reversed on other grounds after limited grant of certiorari, 390 U.S. 341. There, as here, the Commission's initial case depended primarily on trade experience and the buyer's knowledge rather than on proof of the seller's actual costs. There, as here, the buyer—pointing out that it purchased especially large quantities—contended that cost savings achieved by its suppliers were sufficient to justify the price differential proved by the Commission. Assuming *arguendo* that the quantity differences were sufficiently large "to cast on the Commission the burden of showing that petitioner knew or should have known that [the price discounts] still could not be 'cost-justified" (359 F. 2d at 364), the court of appeals ruled that the Commission carried its additional burden. The

court found it "immaterial" that the Commission "did not prove the costs of the suppliers" (*ibid.*). Under *Automatic Canteen*, the court held, the Commission is free to rely on inferences drawn from circumstantial evidence in the record in order to show that Fred Meyer knew or should have known that the discriminatory terms and prices it received were not cost justified (*id.* at 365).[37] See also *National*

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[37] A & P makes much of the fact that "[t]he Ninth Circuit in *Fred Meyer* did not indicate any intention to modify its earlier decision in *Alhambra* [*Motor Parts* v. *Federal Trade Commission*, 309 F.2d 213 (C.A. 9)]" (Br. 34 n.36). In *Alhambra* the court of appeals paraphrased *Automatic Canteen* in terms thought by A & P to impose a properly stringent burden on the Commission. But *Alhambra* does not assist A & P, and to the extent it may be inconsistent with *Fred Meyer*, the later case should control.

Alhambra involved the Commission's challenge to a price advantage received by a buying group composed of wholesale distributors of automotive parts. The buying group performed warehousing services for its members and thus allegedly reduced the costs incurred by manufacturers in selling to members of the group. When charged with receiving an unlawful discriminatory price in violation of Section 2(f), the buying group's members asserted a cost justification defense on the basis of the group's warehousing function. The Commission sustained the Section 2(f) charge, affirming the hearing examiner's initial decision without opinion. 57 F.T.C. 1007, 1025. The examiner, in turn, concluded that the buying group's members "were successful operators in a highly competitive market and knew the facts of life so far as the automotive parts market was concerned and knew that no cost justification could be maintained by the sellers since no difference in the cost of manufacture, sale or delivery was involved" (*id.* at 1020). This conclusion, however, was unsupported by any specific consideration of the asserted cost justification defense. In particular, the examiner's decision did not refer to any

Parts Warehouse, 63 F.T.C. 1692, 1730-1736, affirmed *sub nom. General Auto Supplies, Inc.* v. *Federal Trade Commission*, 346 F. 2d 311 (C.A. 7), certiorari dismissed, 382 U.S. 923.

The court of appeals in this case wrote (Pet. App. 26a) that *Automatic Canteen* requires the Commission "to go forward with some evidence that the buyer knew that the discriminatory prices it was receiving could not be cost justified * * *."[38] According to A & P, this formulation, closely resembling the language used in *Fred Meyer* (see 359 F. 2d at 364), relieves the Commission of its responsibility to introduce evidence that the discriminatory prices in fact could not be cost justified. We disagree.

The court of appeals' reference to the Commission's burden of going forward with evidence that a buyer knew or should have known that a discriminatory price could not be cost justified is simply a convenient shorthand for the *Automatic Canteen* test. The court of appeals' emphasis on the buyer's knowledge reflects a realization that proof of such knowledge in-

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evidence regarding the warehousing function performed by the buying group for its members and the possibility of resulting cost savings to automotive parts manufacturers. Following *Automatic Canteen*, the court of appeals held that the Commission had not carried its burden of coming forward with sufficient evidence concerning cost justification. In the present case, by contrast, the Commission explicitly found that Borden's discriminatory price was not cost justified (Pet. App. 41a, 48a-49a).

[38] See also *American Motor Specialties Co.* v. *Federal Trade Commission, supra*, 278 F.2d at 228; *American News Co.* v. *Federal Trade Commission, supra*, 300 F.2d at 111.

evitably entails proof of the fact known, namely, that the discriminatory price could not be cost justified. See 2 J. Wigmore, *Evidence* § 267, at 92 (3d ed. 1940) ("There is however a large class of cases where * * * Knowledge * * * is of service only *evidentially, i.e.* as forming *a second step of inference to some other fact* which forms the ultimate object of proof" (emphasis in original)). Knowledge ordinarily is derived from the underlying facts.[39] We therefore may accept, for purposes of this case, A & P's argument that, under *Automatic Canteen*, the Commission must introduce some evidence of both the lack of cost justification and the buyer's knowledge thereof (see A. 1127a-1130a, 1233a).[40] But that does not help A & P for, as this case and *Fred Meyer* demonstrate, the same evidence may serve both purposes, and that evidence need not be direct evidence of the seller's costs. As the Court

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[39] See, *e.g.*, *Turner* v. *United States*, 396 U.S. 398, 416 and n.29; *Leary* v. *United States*, 395 U.S. 6, 46 n.93; *United States* v. *Seidman*, 503 F.2d 1027 (C.A. 9); *United States* v. *Joly*, 493 F.2d 672, 675-676 (C.A. 2).

[40] The court of appeals commented that the Commission had arrived at its finding of liability under Section 2(f) "without a square holding as to the factual absence of cost justification" (Pet. App. 25a). This comment overlooked the fact that the Commission expressly adopted the ALJ's finding that Borden's price discrimination could not be cost justified (Pet. App. 41a, 48a-49a; A. 1109a-1110a). The Commission itself stated explicitly that "service savings to Borden could not in any way justify the price differentials" (Pet. App. 48a). In short, the Commission did not ignore its burden under *Automatic Canteen*, and the court of appeals' remark can best be explained either as a simple oversight or as a reference to the absence of a formal cost study by the Commission.

in *Automatic Canteen* plainly indicated (346 U.S. at 79-80), formal cost studies are not required to prove a prima facie case under Section 2(f). Rather, the *Automatic Canteen* evidentiary requirements may be satisfied by inferences drawn from circumstantial evidence in the record.

This is a salutary rule. A requirement that the Commission produce direct evidence of a seller's costs or a formal cost study would unreasonably burden enforcement of Section 2(f). Even if the Commission could obtain the necessary data, the commitment of government resources necessary to establish a single violation would be so great that proceedings against buyers under the Robinson-Patman Act would come to a standstill. Such a result would be antithetical to the Act's primary purpose, the correction of abuses associated with the growth of large chain store buyers (see page 33, *supra*). *Automatic Canteen* never contemplated such a development. The Court held that, before the Commission has introduced any evidence regarding lack of cost justification and the buyer's knowledge thereof, "[c]onsiderations of fairness and convenience" preclude any requirement that the buyer introduce such evidence. These considerations no longer control, however, once the Commission has made a prima facie showing that a discriminatorily low price could not have been cost justified and that the buyer knew it.

Where the Commission has made such a showing, based on circumstantial evidence, it is reasonable to require that the buyer come forward with some re-

buttal. Although buyers typically do not enjoy direct access to seller's cost figures, they have, by definition, been parties to the transactions in which they received discriminatory prices, and frequently they have maintained long-standing business relationships with the sellers involved. They have access to discovery under the Commission's rules. In addition, buyers' industry experience generally places them in a better position than the Commission to identify particular areas in which sellers may have achieved cost savings.

There is, moreover, nothing unusual in the Commission's ruling that, once a prima facie case has been presented, the burden of coming forward with evidence shifts to the buyer. This is merely an example of accepted practice under the Administrative Procedure Act. Section 7(c) of the Act, 5 U.S.C. 556(d), states: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." The legislative history of this provision "indicates that it allocates the burden of going forward rather than the burden of ultimate persuasion" and that the burden of introducing evidence may shift once the agency has presented credible and credited evidence in support of its position. See *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 548 F. 2d 998, 1004, 1013-1015 (C.A.D.C.), certiorari denied *sub nom. Velsicol Chemical Corp.* v. *Environmental Protection Agency*, 431 U.S. 925; *Old Ben Coal Corp.* v. *Interior Board of Mine Operation Appeals*, 523 F. 2d 25, 30 (C.A. 7);

National Labor Relations Board v. *Mastro Plastics Corp.*, 354 F. 2d 170, 176 (C.A. 2), certiorari denied, 384 U.S. 972. As the report of the Senate Judiciary Committee stated:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain.

S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945). See also H.R. Rep. No. 1980, 79th Cong., 2d Sess. 36 (1946); Attorney General's Manual on the Administrative Procedure Act 75 (1947).

C. The Commission Introduced Sufficient Evidence That Borden's Private Label Prices To A & P Were Not Cost Justified

It remains only to recount briefly the evidence introduced by the Commission to show the lack of cost justification for Borden's bid.

1. First and foremost among this evidence are Borden's statements to A & P that the September 1965 bid was offered on a meeting competition basis only and could not be justified on any other ground (see pages 7-9, *supra*). To be sure, this Court observed in *Automatic Canteen* that neither buyers nor the Commission need always credit fully such comments by a seller. The Court said (346 U.S. at 80 n.24): "[T]he Commission may consider that a seller stating that a price would be unlawful might

in some situations be puffing rather than stating anything which a buyer can rely on or should be charged with." Nonetheless, Borden's statements that its private label prices could not be cost justified are surely some evidence that in fact a cost justification defense was unavailable.

This view seems especially compelling in light of *Automatic Canteen's* teaching that "the buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices" (346 U.S. at 79).[41] Of course, as this quotation illustrates, Borden's statements are highly relevant in proving A & P's knowledge that the private label prices could not be cost justified. See also *Mid-South Distributors* v. *Federal Trade Commission*, *supra*, 287 F. 2d at 519; Frey, *supra*, 36 Geo. Wash. L. Rev. at 366. But that does not make them irrelevant to the issue of the actual lack of cost justification. There is no support for

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[41] See also the statement of Representative Utterback, the leading House manager, in presenting the conference committee report on the bill that became the Robinson-Patman Act (80 Cong. Rec. 9419 (1936)):

> [Section 2(f)] affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier for him to resist the demand for sacrificial price cuts coming from mass-buyer customers, since it enables him to charge them with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers.

A & P's attempt to bifurcate the Commission's evidence into two mutually exclusive categories, one relevant only to the buyer's knowledge, the other only to the actual cost justification for the seller's bid.

2. In addition to Borden's statements about the impossibility of justifying its bid on any ground other than meeting competition, the Commission introduced cost data supplied by Borden to A & P during negotiations in July and August 1965 (A. 60a-64a, 296a-299a, 598a-636a, 641a). Comparison of these cost figures with the offer ultimately accepted by A & P (A. 738a-765a, 785a-789a) reveals that Borden's costs on quarts of milk were almost identical to the price received by A & P and that Borden's costs on gallons and half-gallons were significantly higher than the prices received by A & P on those items (see Pet. App. 16a, 50a-51a; A. 1081a, 1083a, 1102a). A & P characterizes the cost figures presented by Borden during negotiations as "sales tools" (Br. 6, 32), and the Commission conceded that the data "may not be entirely accurate" (Pet. App. 50a).[42]

Again, however, the figures are evidence that the substantial price discount obtained by A & P could not be justified on the basis of cost savings to Borden.[43] Whether Borden's salesmen "understated their

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[42] A & P's Chicago Unit Dairy Buyer testified, however, that he found the Borden officials who prepared the cost figures "honest and forthright" (A. 291a).

[43] A & P notes (Br. 5 n.7) an alleged inconsistency in the projected profit figures reported by Borden in May and July

anticipated profit" (A & P Br. 5) has little bearing on the case; the question, rather, is whether Borden achieved unique cost savings in serving A & P in order to justify the significantly lower prices enjoyed by A & P alone. Even if a prudent business person in A & P's position would have suspected that Borden's profits under the private label agreement would be higher than Borden was willing to admit, Borden's cost figures do indicate that Borden did not expect cost savings equivalent in value to the price discount received by A & P.[44]

1965. The two Borden documents cited by A & P (A. 574a-589a, 598a-618a) are not directly comparable, however, because the later private label price quotation was the first one based on calculations reflecting A & P's willingness to accept reduced service terms. This is at least a partial explanation for the higher gross profit "per point" stated in the July 1965 quotation. Indeed, the differences between Borden's May and July figures demonstrate the inaccuracy of A & P's claim that all of Borden's cost figures "used total historical costs for full service delivery to all customers from Borden's obsolete Chicago dairy plant" (Br. 5).

A & P also maintains (Br. 12) that, in attempting to evaluate the relationship between Borden's bid and its costs, it relied heavily on the so-called "2-2-2" formula derived from previous experience in New York State. But Borden's cost figures plainly indicated that wage rates in Chicago were higher than in New York State (A. 638a, 641a), and the administrative law judge found that application of the "2-2-2" formula in the Chicago area would result in an underestimation of Borden's costs (A. 1083a, 1104a-1105a). A & P's continued reliance on the formula, even after being apprised of the higher Chicago wage rates, helps to show the company's willingness to accept a price that could not be cost justified.

[44] In addition to the cost figures presented to A & P during the negotiation period, Borden also prepared data reflecting

3. The Commission submitted evidence drawn from actual trade experience in the Chicago area after the commencement of Borden's private label service to A & P. Other customers who accepted the limited service option made available by Borden in January 1966 did not receive a discount as large as A & P's, even though Borden's only possible additional saving in serving A & P (elimination of the cost of advertising the Borden brand) could not have justified the remaining difference in price (A. 1105a-1106a; Pet. App. 48a, 51a).[45]

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its actual experience during the first several months under the private label agreement (A. 804a-806a, 836a-839a). The administrative law judge apparently believed that this material contributed persuasively to complaint counsel's showing that the price discounts received by A & P could not be cost justified (A. 1125a-1127a). Correctly stating that a formal cost study is unnecessary to the establishment of a prima facie case under Section 2(f) (Pet. App. 47a; see pages 48-49, *supra*), the Commission found that Borden's studies were not "sufficiently reliable" and hence "did not decide whether Borden's internal cost calculations * * * are accurate" (Pet. App. 54a n.31). Even if Borden's post-agreement studies are completely ignored, the Commission presented sufficient evidence to satisfy *Automatic Canteen's* requirement of a showing that a discrimination in price could not have been cost justified. Accordingly, A & P's declaration (Br. 28 n.28) that there was no formal Borden cost study, though accurate, does not detract in any way from the result reached by the Commission and the court of appeals.

[45] In another attempt to embroil this Court in the factual controversies properly resolved below, A & P cites testimony of its witnesses to the effect that the great majority of A & P's competitors in Illinois and Indiana received more service than A & P (Br. 31 n.31). The important point, however, is that even those stores that did *not* receive more service than

In May 1966, when Borden attempted to invoke a provision in the private label contract calling for price increases based on increases in seller's costs, A & P balked and accepted the proposed increases only on its purchases of Borden label products (A. 1107a; Pet. App. 52a). Ten months later, when A & P finally did agree to a private label price increase based on Borden's increased costs, that increase was less than 60 percent of the increase already accepted by Borden's other customers (A. 1090a, 1107a; Pet. App. 52a; see pages 14-15, *supra*). These factors together demonstrate that the discount received by A & P on private label milk and dairy products could not have been justified by Borden's cost savings in processing and delivering the private label line.

4. If further evidence of the lack of cost justification is necessary, it can be found in Borden's refusal to provide the customary letter of availability when requested to do so by A & P (see page 12 and note 13, *supra*). Had Borden's final bid been cost justified, Borden would have had every reason to make

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A & P paid higher prices than A & P. Moreover, Borden's delivery foreman in the Gary-Hammond area of Indiana, the only witness with firsthand knowledge of the comparative services rendered in that locale, testified that most of A & P's large competitors received the same service as A & P, except that the disfavored competitors did not preorder (A. 190a-196a). He further testified that preordering generally did not make a significant difference because Borden's drivers knew from experience the approximate quantities of milk that each store would need each day and because special deliveries were made to A & P and other stores if they needed extra milk (A. 194a, 195a-196a).

the same terms available to other customers. When Borden would not assure A & P that the private label prices were proportionately available to A & P's competitors, Borden itself provided evidence that A & P's discount could not be cost justified.

5. In short, the situation in this case is vastly different from that reviewed by the Court in *Automatic Canteen*. There, the hearing examiner and the Commission made no findings concerning the absence of cost justification and the buyer's knowledge thereof. Here, the administrative law judge and the Commission made square findings on both points, and those findings are supported by substantial evidence.[46]

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[46] In *Automatic Canteen* the Commission took the position that a prima facie case under Section 2(f) could be established without any evidence whatever regarding cost justification or the buyer's knowledge. In rejecting this view, the Court did not need to specify the precise evidentiary burden the Commission must carry. The Court's opinion focused on the statutory requirement that, in order to violate Section 2(f), a buyer must "knowingly" induce or receive an unlawful discriminatory price. The Court offered several examples of the kinds of evidence that would establish "a sufficient degree of knowledge to provide a basis for prosecution" (346 U.S. at 80). The Commission therefore believes that, in an appropriate case, the approach of *Automatic Canteen* would allow the Commission to satisfy its burden simply by showing that the buyer knew or should have known that the prices it received could not be cost justified. See *Suburban Propane Gas Corp.*, 73 F.T.C. 1269. The Court need not resolve that issue here, because the Commission's evidence showed both the buyer's knowledge and the actual lack of cost justification. If, in a future case, evidence of knowledge does not also establish lack of cost justification, it may become necessary to decide whether the lesser showing is sufficient under *Automatic Canteen*.

Under these circumstances, the Commission properly shifted to A & P the burden of rebutting the Commission's prima facie case.

The "[c]onsiderations of fairness and convenience" that motivated the Court in *Automatic Canteen* support the Commission's procedure in this case. When the Commission has made a circumstantial showing as strong as that summarized above, it is reasonable to require the buyer to come forward with some evidence in its defense. As the court of appeals concluded (Pet. App. 27a),

> [t]o here require the Commission to submit a formal cost study or other cost-measuring analysis, in addition to the testimony or other evidence it has already adduced, would go far towards foreclosing the possibiilty of a § 2(f) proceeding even where all significant indications and factors point to the absence of cost justification and the likelihood of illegal price discriminations.

A & P argues (Br. 31-33) that the Commission erred in ruling that, once a prima facie case of buyer's liability under Section 2(f) has been established, the buyer must submit a cost study if it wishes to show that the prices it received were actually cost justified (see Pet. App. 47a, 54a). A & P contends that this rule places too great a burden on the buyer, because, by requiring proof of the seller's costs, it obligates the buyer to produce information available only to the seller. But the Commission explicitly stated that it "would be willing to lower the standard if it was demonstrated that the buyer could not ob-

tain the necessary records from the seller to undertake the study" (Pet. App. 55a). Moreover, as the Commission found (*ibid.*), A & P experienced no such problems in this case.[47] Although A & P was able to obtain from Borden the documents it needed, the cost studies prepared by A & P were defective and did not satisfactorily rebut the Commission's prima facie case (A. 1130a-1151a; Pet. App. 23a-24a, 54a).

A & P's argument seems to proceed on the premise that because A & P failed to carry its evidentiary burden, that burden was wrongly imposed. *Automatic Canteen* did not hold, however, that no buyer should be subject to evidentiary requirements it cannot meet in a particular case. Some buyers will fail

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[47] A & P is inaccurate in asserting (Br. 14, 32) that it was forced to reconstruct Borden's costs "over eight years after the challenged events," at a time when Borden "had little incentive to help A & P * * *." While administrative hearings did not begin until 1973, A & P knew of the Commission's investigation as early as 1967 (A. 1175a-1176a, 1230a-1231a). The complaint was issued in October 1971, several months before A & P terminated Borden as its supplier of milk and dairy products. In addition, Borden was not without incentive to help A & P prepare its case. Borden was named in Count III of the complaint, charging a combination to stabilize and maintain milk prices, in violation of Section 5 of the Federal Trade Commission Act (see note 20, *supra*), and was a party to the administrative proceeding. A Commission decision against A & P therefore threatened to trigger private treble damages actions against Borden, either by its own injured competitors or by disfavored customers who were competitors of A & P. Similarly, Commission findings unfavorable to A & P, threatened Borden with adverse evidentiary effects in such private treble damages suits, either through collateral estoppel or under Section 5(a) of the Clayton Act, 15 U.S.C. 16(a).

to show cost justification because there is no justification to be shown. A failure of this sort cannot mean that someone else should have borne the burden; it means, instead, that a finding of buyer liability is proper.

The Court in *Automatic Canteen* did not intend to render Section 2(f) nugatory. It merely sought to strike a balance of "fairness and convenience" that would require the Commission to go forward with some evidence of the lack of cost justification and the buyer's knowledge thereof. The Commission did so in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This reply brief is submitted on behalf of petitioner The Great Atlantic & Pacific Tea Company, Inc. ("A&P") in response to the brief for the Federal Trade Commission (the "Commission" or "FTC").[1]

At the outset, we are constrained to note a few of the more fundamental inaccuracies in the Commission's description of this case. As noted in our main brief (at pp. 8, 10), there has

[1] A&P's initial brief and the Commission's brief are abbreviated "A&P Br." and "FTC Br.". "Pet. App." refers to pages of the Appendix to the Petition for Certiorari, and "A" refers to pages of the Appendix.

never been any dispute about the following comparison of the prices offered to A&P:

	Quarts	Half Gallons	Gallons
Borden's Original Quote	$.1855	$.3430	$.6860
Bowman's Offer	.1696	.3136	.6272
Borden's Final Offer	.1712	.3124	.6248
Final Difference Per Quart .	($.0016)	.0006	.0006

In short, the Bowman offer (the legality of which is unquestioned) was at prices which were substantially lower than Borden's initial quote and very close to the Borden offer accepted by A&P. In the final analysis, Bowman was still lower on quarts by 1.6 mills, while Borden was lower on half gallons and gallons by .6 of a mill per quart — or about ⅓ of 1% of the final Borden prices.[2] On an overall basis (including the price of by-products held not relevant) the most that the Commission claims is that Borden was lower by "nearly $83,000 in additional annual savings" (FTC Br. 9) on annual sales of over $5,600,000, which is only 1.5%. Yet, in the face of these indisputable facts, the FTC brief repeatedly states that Borden's prices were substantially lower than Bowman's prices (*e.g.*, FTC Br. 9, 20, 26, 33, 35).

Even more flagrantly unfair are the FTC's repeated attempts to stretch the facts of this case to make them fit the "lying buyer" rule applied in *Kroger*.[3] It asserts that, after Borden had offered $820,000 in "annual savings", Elmer Schmidt of A&P told Gordon Tarr of Borden "sharpen your

[2] Sales of these three homogenized milk items in paper containers in the Chicago-Calumet area accounted for the vast preponderance of the allegedly discriminatory sales (even before the court below found it had "no Robinson-Patman jurisdiction" over sales of by-products, *e.g.*, cottage cheese, buttermilk, skim milk, sour cream, etc., Pet. App. 13a, n.7). As we pointed out previously, the prices quoted by Bowman were for brand label or private label products (at A&P's option), and were otherwise more favorable to A&P (A&P Br. 7, n. 10; 8, n.12; 10).

[3] *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

pencil a little bit because you are not quite there" and that based on this the "administrative law judge found that 'A&P gave false price information to Borden as to Bowman's competing bid' (A. 1151a-1152a), and the Commission adopted that finding" (FTC Br. 21; see also, FTC Br. 8, 37-39). Both the record and the opinions below are to the contrary.

Mr. Tarr was the only witness to recall any "sharpen your pencil" remark, and he testified that it had no material effect but only resulted in an "insignificant" or "slight, if any, change" in by-product prices (A141a-143a). Actually, the only adjustment in by-product prices was made before Borden's "$820,000 annual savings" offer, which was never improved upon (A571a, 643a, 770a-771a, 774a-775a). Moreover, the administrative law judge's finding of fact 166 (on which the FTC's brief relies) referred to very different matters as to which he was reversed.[4] The Commission's opinion refers to the "sharpen your pencil" testimony only in noting its irrelevance (see notes 3 and 5 at A1199a-1200a); neither the Commission nor the court of appeals mentioned it in considering the § 2(f) charge (as the FTC's brief concedes at p. 38, n.30).

Thus, the facts are that A&P has been exonerated of any affirmative misrepresentation but has been convicted of a 2(f) violation on the ground that it "induced" Borden's final offer (by considering the Bowman offer) and accepted it believing it was better than the Bowman offer. The Commission's attempt to present this as a "lying buyer" case (FTC Br. 36-40) is empty rhetoric.

A more accurate statement of this case is made in the *amicus curiae* brief submitted on behalf of the Small Business Legislative Council ("SBLC"), a 56-member lobbying group which views purchasers' efforts to obtain lower prices as "predatory", "anticompetitive", and "evil" (SBLC Br. 6). The

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[4] He was referring to such matters as A&P's representing that "it had a bid [from Bowman] which could be compared to Borden" when the ALJ found that Bowman's bid was conditional and not comparable (FF 166, A1151a-1152a; FF 114, A1112a-1113a). These findings were reversed by the FTC (Pet. App. 36a, n.2).

SBLC asserts: "A&P's statements of inducement to Borden that its initial offer was 'not in the ballpark' and that a $50,000 reduction 'would not be a drop in the pocket' were tantamount to affirmative misrepresentation" even though "such statements . . . were literally true . . ." (SBLC Br. 11). The difference between these true statements and the fraudulent misrepresentations in *Kroger* is readily apparent.

The FTC's brief again prefers *ipse dixit* to plain fact on the cost justification issue. As the opinion below made clear:

> "[T]he Commission did not itself submit a cost study to show the absence of cost justification [footnote omitted]. A finding of § 2(f) liability, therefore, has been arrived at without a square holding as to the factual absence of cost justification." (Pet. App. 24a-25a)

Both the Commission (Pet. App. 48a) and the court of appeals (Pet. App. 9a, 24a) compensated for this failure to show lack of cost justification by holding that the burden of proof on that issue shifted to A&P when Commission counsel presented some evidence that A&P had reason to doubt that Borden's prices could be cost justified.

The FTC's brief, however, takes a new tack. It purportedly accepts "A&P's argument that, under *Automatic Canteen,* the Commission must introduce some evidence of both the lack of cost justification and the buyer's knowledge thereof", and argues that Commission counsel *did* show a lack of cost justification (FTC Br. 54). It contends that the above-quoted statement by the court below is incorrect, that the court's error "can best be explained either as a simple oversight or as a reference to the absence of a formal cost study by the Commission" and that the court "overlooked the fact that the Commission expressly adopted the ALJ's finding that Borden's price discrimination could not be cost justified" (FTC Br. 54, n.40, citing FF 109, 110; A1109a-1110a). These "ALJ findings of fact", however, were based solely on the "Malone calculations" which were *rejected* by the Commission as insufficient to show

the absence of cost justification (Pet. App. 50a; 51a, n.25). Furthermore, the Second Circuit confirmed this in the footnote omitted from the above-quoted portion of its opinion.[5]

The Commission's other contentions which seem to merit response are answered below.

I.

THE DECISION BELOW ARTIFICIALLY RESTRAINS COMPETITIVE BIDDING.

This first point of our main brief (A&P Br. 16-20) is hardly adverted to by the Commission, except when it says: "A buyer that merely solicits bids and accepts the lowest offer would not violate Section 2(f); something more is necessary. The Robinson-Patman Act demands a showing of competitive injury . . ." (FTC Br. 40). The Commission's action in this very case, however, demonstrates the nebulous nature of this "something more". It held: "The Robinson-Patman Act does not require proof that injury actually occurred but merely a showing that competition *may* be reduced because discrimination took place" (A1207a, emphasis in original). The Commission found this test satisfied since price differentials in "industries such as retail food, which are characterized by keen competition and low profit margins . . . . compel an inference of adverse competitive effect" (A1208a). In other words, the "something more" is readily assumed in any highly competitive industry, in

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[5] There (Pet. App. 24a, n.11), the court found that, apart from an A&P cost study held insufficient by the FTC (in large measure because it was not contemporaneous), "the only other evidentiary material as regards cost justification" was the data prepared by Joseph Malone (principally for use in the A&P negotiations) on which the FTC refused to rely. Malone, an accountant on Borden's staff, admitted that his figures did not even attempt to show the true cost of serving A&P or to compare it with the cost of serving other customers (A30a-31a, 42a-44a, 51a-52a). While the Commission cited Malone's calculations as evidence that A&P had reason to doubt cost justification (Pet. App. 50a), we submit that they are no more reliable for that purpose.

which the only way for the buyer to avoid § 2(f) liability would be to refuse the lower price.[6]

At bottom, the fact remains that in Count I the Commission examined the "same conduct" here challenged under § 2(f) and determined it did not constitute an incipient violation of "the policy of the Robinson-Patman Act" (Pet. App. 5a, 37a; A&P Br. 17-19). The Commission sees no inconsistency in claiming that this same conduct constituted an actual violation of the Robinson-Patman Act because such a violation requires "much more" proof, going *beyond* what would be required under Section 5 of the FTC Act. The only additional proof to which it refers is that the buyer "having actively induced Borden's bid, deliberately accepted a discriminatory price that it knew could not be cost-justified" (FTC Br. 41, n.32). But in virtually all competitive bidding situations, the buyer will have "actively induced" and "deliberately accepted" the lowest bid without knowing whether a cost justification defense is available. Thus, the FTC's argument would make a risky business of any use by buyers of competitive bids.

A&P's negotiations with Borden were exhaustively examined under the more encompassing standards of Section 5, and the Commission not only held A&P innocent but held it could reach no other result consistent with the public interest (Pet. App. 36a-39a). We submit that the same public interest also requires dismissal of the more technical charge. In its recent ruling in *United States* v. *United States Gypsum Co.*, 98 S. Ct. 2864 (1978), this Court reaffirmed its rationale in *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61 (1953),

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[6] Although the Commission's opinion feared "a scenario where the seller automatically attaches a meeting competition caveat to every bid" and held that disclosure of competitive prices would be inappropriate (Pet. App. 39a), the FTC's brief offers no solution to the dilemma thus posed for buyers who wish to take advantage of lower prices. On the one hand, it makes light of the "spectre of exposing buyers to liability for engaging in ordinary business practices" (FTC Br. 40-41), while on the other, it condemns A&P for engaging in the ordinary business practice of seeking competitive offers and accepting the one which appeared best (FTC Br. 6).

> "that as a general rule the Robinson-Patman Act should be construed so as to assure its coherence with 'the broader antitrust policies that have been laid down by Congress' . . ." (98 S. Ct. at 2884).

The Court there condemned practices which would, in the name of the Robinson-Patman Act, "have the effect of eliminating the very price concessions which provide the main element of competition in oligopolistic industries and the primary occasion for resort to the meeting competition defense" and would thus "contribute to the stability of oligopolistic prices and open the way for the growth of prohibited anticompetitive activity" (98 S. Ct. at 2883-84). The Commission's argument here is in stark contrast; it urges that the Robinson-Patman "Act makes uniform prices to competing customers the rule" and appeals to "the basic statutory requirement of uniform pricing" (FTC Br. 29). This advocacy of price uniformity and stability is, we submit, clearly inconsistent with "the broader antitrust policies that have been laid down by Congress".

II.

A&P SHOULD NOT HAVE BEEN DEPRIVED OF THE "MEETING COMPETITION" DEFENSE.

Our main brief pointed out (at p. 22) that buyer liability has been held dependent on seller liability under the Act in every prior case except for *Kroger*. The Commission answers "it is far from clear" that Borden had a meeting competition defense (FTC Br. 26-27 & n.23). What is quite clear, however, is that there was no finding that Borden did *not* have such a defense. The Commission therefore suggests that, if there was a failure of proof in this regard, the case should be remanded to it to remedy this failure (FTC Br. 28, n.24). We submit that no such remand is warranted (the Commission having failed to prove the absence of any Robinson-Patman defense and A&P's knowledge thereof), particularly at this late date.

Commission counsel tried and won this case below on the theory that, even when the seller has a meeting competition

defense, the *Kroger* case should be extended to deny that defense to a buyer who accepts his offer knowing it is the lowest offer. If that ruling is reversed (as we respectfully urge it should be), it would seem highly inappropriate to revivify this proceeding (which consumed 110 hearing days examining a 1965 transaction) for the purpose of allowing the Commission to reverse its field and have another go at A&P under a different theory.[7]

The Commission also argues that the buyer may be liable when the seller is not because a "buyer's good faith" requirement should be engrafted onto the statute (FTC Br. 28-29). Section 2(f), the only provision of the Act relating to buyers, does not mention good faith but proscribes the knowing inducement of "a discrimination in price which is prohibited by this section [2]". Section 2 permits price discriminations by a seller acting in good faith to meet competition, and the "buyer is not liable under § 2(f) if the lower prices he induces are . . . within one of the seller's defenses" (*Automatic Canteen Co. of America* v. *FTC*, *supra*, 346 U.S. at 74). The Commission's attempt to add a "buyer's good faith" requirement is not supported by this statutory scheme.

A requirement of "good faith" seems innocuous in the abstract, but here the Commission defines a "lack of good faith" in such a way as to condemn honest bargaining. It faults A&P because it was not satisfied with the first offer it received but "put the matter up for outside bids" (FTC Br. 6), and then accepted a revised offer from Borden in the *belief* that it was lower than the competing bid.[8] Thus, the Commission would

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[7] If the Court should rule otherwise, however, any remand should include a plenary hearing on whether Borden was guilty of illegal price discrimination under § 2(a) and whether Borden's prices to A&P were cost-justified, on which basic issues there have been no findings to date.

[8] The Commission's opinion states:

> "For example, if the Borden bid '*beat*' the Bowman bid yet A&P contemporaneously reasonably believed that it only *met* the bid, we believe A&P (as well as Borden, if Borden prudently reached the same conclusion) could assert the meeting competition defense." (Pet. App. 42a, emphasis in original)

find a lack of "good faith" on the buyer's part whenever he looks for a competing seller and harbors the thought that the price he ultimately accepts is the lowest price offered him. That kind of "bad faith" is, of course, indigenous to any competitive buying situation.

A. The Availability of the "Meeting Competition" Defense to the Buyer Should Not Depend on the Fortuitous Exact Matching of Both Bids.

Since an exact matching of competitive bids can hardly be expected in real life, the meeting competition defense is available even to a seller who makes a better offer, provided that he does so in good faith (A&P Br. 22-25). As this Court stated in *Gypsum:* "A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient" (98 S. Ct. at 2881). The FTC agrees as to sellers, but nevertheless insists that buyers are not free to accept the best offer (FTC Br. 28-30). By this stringent application of the "meet but not beat" standard to buyers, the FTC would prevent such sales except in the extraordinary situation of a precise "mirror image" duplication of competitive bids.

In short, what the seller may lawfully offer, the buyer may not accept since buyers "are not ignorant of the competing offers" and "sellers and buyers may be treated differently under the Act" (FTC Br. 30). Such a rule would artificially restrict competitive buying. The first bid received from a seller who mentioned meeting competition would establish the buyer's legal floor, and he could not accept a lower offer made on that basis.

A seller who intends only to meet a competing bid may offer a lower price because he is uninformed as to the price level of the other bid; he simply quotes a price which will yield a satisfactory return. Though the buyer may have "induced" him to do so by truthfully disclosing his receipt of an offer that was

lower than the seller's original price (without disclosing details of the competing offer), the truthful buyer should not then be condemned for "inducing" a "mistaken bid". In such circumstances, there is no reason in law, economics or common sense to hold the buyer liable for accepting what he believes is the lowest price available to him.[9] As the FTC wrote in dismissing Count I of the instant complaint:

> "We . . . do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that such a change would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution." (Pet. App. 38a)

B. The Borden Offer Was Not "Substantially" Better Than the Bowman Quote.

The Commission's brief suggests that, even if accepting a lower bid does not always deprive a buyer of the 2(b) defense, it does when the difference is "substantial" (FTC Br. 35). By any definition of that term, however, Borden was not "substantially" below Bowman here.[10]

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[9] It is quite a different situation when a seller's lower price results from the buyer's affirmative misrepresentations as to the existence or the price level of a competing bid (as was the case in *Kroger*). Only in such a case can it be seriously contended that allowing a buyer to rely on the seller's § 2(b) defense would defeat the essential purpose of § 2(f) by enabling the buyer to profit by his own cupidity — and even then we submit that the buyer's conduct should be condemned under § 5 of the FTC Act (see A&P Br. 27, n.26).

[10] What the FTC means by "substantial" is nowhere defined, but the *most* the FTC has ever claimed is that the "annual savings" promised by Borden were some $83,000 more than the $737,000 offered by Bowman — which Schmidt of A&P calculated using only Bowman's prices on the same 11 items offered by Borden in private label (FTC Br. 9-10). This alleged difference between the annual savings offered by Borden and Bowman is only 1.5% of the $5,600,000 purchase price for the 11 items on which the "savings" were calculated (or even less if the $7,500,000 price for all 22 items is considered). In comparison, Borden offered to all volume purchasers,

The only evidence cited to support the Commission's argument is Herschel Smith's statement that a comparison prepared by his subordinate Elmer Schmidt gave one the impression that Borden's bid was "substantially better" than Bowman's. Our initial brief quoted that portion of Mr. Smith's testimony, and it showed that he found the price difference between the two bids to be "infinitesimal" or "a matter of mills" (A&P Br. 12-13), as the prices themselves attest (p. 2 above).[11] But assuming, *arguendo,* that A&P *thought* that Borden was offering a substantially lower price, A&P's state of mind would not bring it within the rule of *Automatic Canteen* that "a buyer is not liable under § 2(f) if the lower prices he induces are *either* within one of the seller's defenses . . . *or* not known by him not to be within one of those defenses" (346 U.S. at 74, emphasis added).

To aid their assault on the meeting competition defense, Commission counsel also attempt to retread their previously-discredited arguments attacking the Bowman bid. They imply that A&P may not have intended to give "serious consideration" to Bowman's offer (FTC Br. 6), citing to findings of

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regardless of method of delivery, discounts of 26% and more (A829a-832a).

In fact, little or no savings were realized by A&P. Borden eliminated half the "discount" by reducing its Borden brand prices generally (A&P Br. 5, n.6; compare the prices appended to the ALJ's initial decision for the period 1/66-2/66, A1183a-1192a, with Borden's August 1965 quotation for the Chicago-Calumet area, A643a). The other half was hardly enough to cover the increased labor, promotional and other expenses which A&P incurred in converting to private label and limited service (A200a, 305a-307a, 318a-319a). Thus, A&P simply did not receive the extra profit the FTC's brief (at p. 15) suggests A&P should have passed on to its customers.

[11] The Commission charges that A&P "strains credulity" by arguing that, when non-price factors are considered, and the bids are properly analyzed, the Bowman bid was lower overall (FTC Br. 11, n. 12). Yet in *Harbor Banana Distributors, Inc.* v. *FTC,* 499 F.2d 395 (5th Cir. 1974), after carefully comparing non-price factors, the court of appeals held that the challenged price "may not even have been favorable enough to meet competition" (FTC Br. 32, n.25). It is not incredible, moreover, that a buyer might pay a slightly higher price to avoid disrupting a satisfactory relationship with an existing supplier; that is what Borden expected A&P would do here (A85a-87a, 143a-145a), and is consistent with what A&P told Bowman (A474a-475a).

fact by the administrative law judge which were rejected by the Commission itself.[12] They also assert that the Commission, in reversing the ALJ, found that "the Bowman bid was genuine and comparable *if adjusted*" (FTC Br. 6, n.7; emphasis added). The Commission's findings, however, contained no such condition but unqualifiedly held Bowman's bid "comparable and operative" (Pet. App. 36a, n.2; 43a).

As a parting shot on this issue, the FTC's brief asserts that A&P "did not seek to clarify certain aspects of the Bowman bid that would have significantly affected its net costs" (FTC Br. 6, n.8). This is a further reference to the argument that Bowman's offer was conditioned on a volume of purchases higher than A&P's actual volume and on fewer deliveries in the Gary-Hammond area of Indiana than were permissible under union requirements there (FTC Br. 11, n.12). In fact, Bowman advised A&P that there was no volume requirement,[13] and reduced delivery in Gary-Hammond was unimportant.[14] These quibbles were all rejected by the Commission itself when it found the Bowman bid fully operative and comparable and set aside the very findings on which its brief now relies (FF 106, 107, *et al.*, cited at FTC Br. 11, n.12, *expressly overruled* at Pet. App. 36a, n.2). Thus, the validity and comparability of the Bowman offer is no longer subject to challenge.

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[12] In support of his view that the Bowman bid was a "sham", the ALJ relied on hearsay testimony given in *another* FTC proceeding, which did not involve these parties, by a deceased individual who was mentioned for the first time in his opinion (FF 212, A1175a-1176a; FTC Br. 6, n.8). He also cited A&P's failure to ask Bowman for a letter of availability, although A&P normally asked for such a letter only after it had decided on a particular supplier (A305a, 319a-323a), and Bowman had in fact assured Schmidt that the Bowman offer would be made available to other customers (A475a, 484a-485a, 494a-495a). After these facts had been called to the FTC's attention, it categorically rejected Judge Hinkes' "sham" findings (Pet. App. 36a, n.2; 43a).

[13] Bowman's prices were firm as long as Bowman was allowed to supply all of A&P's stores (A465a-466a, 468a). In its offer, Bowman set forth separate (and higher) prices if it were to receive only 70% or 50% of A&P's stores but made no reference to volume (A703a).

[14] Bowman believed that reduced deliveries were possible (A486a-488a). Moreover, A&P's expert cost accountant calculated that the extra delivery days in Gary-Hammond would have increased Bowman's costs by only a few hundred dollars per year on millions of dollars of annual purchases (A996a-1).

C. The Ruling in *Kroger* is Clearly Inapplicable here.

Assuming, *arguendo*, that the Sixth Circuit's ruling in *Kroger* is correct, it did nothing more than impose on buyers who assert a "meeting competition" defense a good faith requirement which would prohibit the kind of fraudulent conduct found in *Kroger*. It has no application to a buyer who truthfully advises a seller that he has a better offer.

The FTC disputes our contention that *Kroger* turned on the buyer's misrepresentation, and argues that the Sixth Circuit focused instead on the price level of the seller's bid (FTC Br. 37, n.28). That statement is belied by the unequivocal language of *Kroger* which we quoted previously (A&P Br. 26): "The controlling point here is not the 'hard bargaining' nor the 'price levels' but the *misrepresentation* of the [competing] bid, in order to induce a discriminatory price" (438 F.2d at 1378, emphasis in original).

The Commission next contends that, even though *Kroger* be limited to "cases in which the buyer affirmatively misrepresented the price offered by a competitor" (FTC Br. 36), A&P is nevertheless liable. It alleges that, after Borden had offered A&P $820,000 in "annual savings", Schmidt told Borden salesman Tarr: "sharpen your pencil a little bit because you are not quite there" and Borden thereafter reduced its price "somewhat further" (FTC Br. 37). Mr. Tarr, the only witness to mention this comment (although he did not recall it during his extensive pre-complaint and pre-hearing depositions, A125a-141a, 883a-892a), said that subsequently there was no "material" price change by Borden but only an "insignificant" or "slight, if any, change" in by-product prices (A141a-143a; see also pp. 2-3 above).[15]

[15] The court below ruled it had no Robinson-Patman jurisdiction over by-products, but in fact the only adjustment in by-product prices was made at the time of Borden's first complete private label proposal offering A&P savings of $410,000 (A643a-676a). Thus, if this "sharpen your pencil" remark was made at all, and had any influence on Borden, it would have been some time prior to the $820,000 offer and would have had no effect at all on the final prices. Mr. Tarr himself acknowledged at the hearing that he "may not have these things in proper sequence" as far as the private label negotiations are concerned (A138a-140a).

The only other possible "misrepresentation" alluded to by the FTC's brief is that, when Mr. Schmidt asked Borden to exclude glass gallons of milk from its private label offer, he said he was doing so because the competing bid did not include them, when actually he wanted glass gallons excluded for reasons of A&P's convenience (FTC Br. 37, n.29). There is no claim that this incident had any effect on the "savings" Borden offered; these remained at $820,000 before and after the "glass gallon" discussion and the time when the FTC asserts the "sharpen your pencil" comment was made. Thus, neither comment had any significance in the negotiations.[16]

The Commission found both of these alleged misrepresentations "not relevant to the charge" (Pet. App. 37a, n.5). Although that finding was made in discussing Count I (under Section 5 of the FTC Act), they were clearly not considered relevant to the 2(f) charge by either the Commission or the court of appeals (FTC Br. 38, n.30). The FTC's proposal (FTC Br. 38, n.30) that this Court should now make new findings of material misrepresentation based on these discredited allegations, and affirm on that basis, has neither factual support nor legal merit.[17]

Moreover, even assuming that Mr. Schmidt did state that Borden should "sharpen its pencil" because it was "not quite there yet" at the time of the Borden glass gallon quote (as alleged in the FTC's brief), that statement would have been entirely accurate since Bowman was well below Borden on glass gallons and Borden's September 1965 quotation had clearly not met the Bowman quote (A283a-286a, 305a-306a, 712a-735a, 772a, 942a).

[16] Borden's initial offers did not include glass gallons, and Schmidt's previous comparison of the competing bids was limited to the 11 items initially offered by Borden (A772a). A&P's reason(s) for not wanting the gallon jugs in private label (which is all the FTC questions) could have had no adverse impact on Borden whatever they were. On the other hand, the *fact* that the gallon glass items were eliminated benefitted Borden by (a) allowing it to charge A&P, for milk in gallon glass containers, over $100,000 more per year than Bowman would have charged, and (b) eliminating this unfavorable comparison when Schmidt's analysis of the two bids was forwarded to Mr. Smith in New York.

[17] "A reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make,

From the beginning, complaint counsel here have insisted that A&P's inducing a better offer by soliciting a competitive bid, and then silently accepting it, was itself a violation of § 2(f). That is the theory on which A&P was held liable below, and which the FTC also defends here (FTC Br. 26, *et seq.*). However, apparently concerned about the continued viability of its "silent buyer" theory, the FTC's brief now strains the facts of this case in a desperate effort to make them fit the conduct condemned in *Kroger*. In doing so, Commission counsel part company with the court below (which called the distinction between a lying buyer and a silent buyer "a fine one indeed", Pet. App. 21a), with the evidence in this case, and with the facts as found.

D. The *Gypsum* Case Does Not Support the FTC's Position.

The Commission purports to find comfort in *Gypsum's* comment that: "It may also turn out that sustained enforcement of § 2(f) . . . will serve to bolster the credibility of buyer's representations" (98 S. Ct. at 2882 n.30, FTC Br. 30). We have already indicated (pp. 6-7 above) that our position is entirely consistent with the rationale of that case. There, this Court held that "interseller verification" is not a permissible response to the "limited number of situations [in which] a seller may have substantial reasons to doubt the accuracy of reports of a competing offer and may be unable to corroborate such reports in any of the generally accepted ways" (98 S. Ct. at 2883).

Had Borden wished to corroborate A&P's report of a competing offer (which was true), among those "generally accepted ways" the *Gypsum* Court mentioned "reports of similar discounts from other customers", "efforts to corroborate the reported discount by seeking documentary evidence or by

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must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

appraising its reasonableness in terms of available market data", and "the seller's past experience with the particular buyer in question" (98 S. Ct. at 2882). An example taken from this record is that Mr. Cannon of Bowman testified that Bowman's offer was not made on a meeting competition basis but Bowman's practice was "not [to] meet competitive offers without a written statement from the customer . . . witnessed by your salesman and submitted to Mr. Hart . . ." (A470a).[18]

Thus the seller who is genuinely concerned about whether he is actually meeting competition has both the means of inquiry and the option of refusing to go further. There is simply no need to compel honest buyers to adhere to a stringent "meet but not beat" requirement and forego the lower prices that should result from comparison shopping and robust bargaining. To require them to do so would have the effect of "eliminating the very price concessions which provide the main element of competition", a result this Court disapproved in *Gypsum* (98 S. Ct. at 2883-84). This attempt by the FTC to erode the meeting competition defense, and to force buyers to become conduits for the exchange of price information between sellers, should fare no better.

III.

THE DECISION ALSO IMPROPERLY DEPRIVED A&P OF THE BUYER'S COST JUSTIFICATION DEFENSE.

A&P's initial brief pointed out that the court below failed to follow *Automatic Canteen* when it "made no finding negativing the existence of cost savings . . ." (346 U.S. at 66) and

[18] The ALJ's opinion stated that Mr. Cannon's testimony would have been supported by Mr. Hart, Bowman's outside counsel, had he lived to testify (A&P Br. 7, n.9).

In a passage quoted by this Court in *Gypsum*, the brief of the Department of Justice argued: "If, after making reasonable, lawful, inquiries, the seller cannot ascertain that the buyer is lying, the seller is entitled to make the sale" (98 S. Ct. at 2882 n.29). Where the buyer is not lying, then we submit that both the buyer and seller should be entitled to make the sale.

instead held against the buyer without a "square holding as to the factual absence of cost justification" (Pet. App. 25a, A&P Br. 28-34). The FTC's response is critical of both the court below (see pp. 4-5 above) and *Automatic Canteen.*[19] It asserts that since the Commission found that the buyer should have known that the prices offered to him could not be cost justified, the same evidence "served simultaneously to demonstrate" lack of cost justification (FTC Br. 44).[20] On that basis, ignoring both the elaborate formula the Commission set up to justify shifting the burden of proof on cost justification to A&P (A&P Br. 29), and the court of appeals' finding as to the absence of any determination of that issue, the FTC's brief blandly asserts that "the Commission's evidence showed . . . the actual lack of cost justification" (FTC Br. 63, n.46).

When a buyer purchases on the same terms and conditions as his competitors (so that cost differences between the two cannot exist) but receives special discounts or allowances not offered to others, then proof of those facts, and that the buyer knew them, may at the same time show both the factual absence of cost justification *and* the buyer's knowledge of it (as in *Fred Meyer, Inc.,* discussed at A&P Br. 34). However, the teaching of *Automatic Canteen* is that where (as here) the buyer receives fewer services or purchases in greater quantities than his competitors, the Commission must show that the cost

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[19] The FTC's view of *Automatic Canteen* is indicated by, among other things, its description of that case as "a departure from the result that might have been expected solely on the basis of the statutory language" and "a modification of the apparent commands of Section 2(b)" (FTC Br. 46-47).

[20] The Commission admits that this may not always be so (FTC Br. 63, n.46). However, since the items of evidence relied on here (pp. 20-26 below) are all seller's self-serving statements, it seems doubtful that the Commission would ever recognize a case in which lack of cost justification would have to be shown independently or by better evidence.

On the other hand, the lack of proof on the cost justification issue necessarily impeaches the FTC's finding that A&P knew that Borden's prices could not have been cost justified, and the FTC's brief is disingenuous in asserting that A&P does not challenge that conclusion (FTC Br. 44).

differences are insufficient to justify the price differences. In such a case, even if the buyer knows the price difference in his favor is substantial (in *Automatic Canteen,* it was 33%) the FTC must still show "that such [service] differences *could not* give rise to sufficient savings" to allow cost justification "*and* that the buyer, *knowing* these were the only differences, should have known that they could not" (346 U.S. at 80, emphasis added). Here, the FTC failed to show any of these essential elements.

The administrative law judge, cognizant of *Automatic Canteen,* made findings of lack of cost justification based upon the Malone data (above at pp. 4-5). When A&P pointed out that the Malone calculations could not possibly support such a finding because they had nothing to do with the comparative cost of serving A&P and serving other customers (p. 5, n.5 above), the Commission recognized their infirmities (Pet. App. 50a) and refused to rely on them (Pet. App. 51a, n.25) or to rule on their accuracy (Pet. App. 54a, n.31).[21] Now, the FTC's brief relies on these calculations, and Borden's "meeting competition" caveat, as its principal proof of lack of cost justification (FTC Br. 57-60).

Preliminarily, the FTC argues that very little by way of proof should be required of it, paraphrasing *Automatic Canteen*'s "references to a buyer's trade experience, size of price discount as compared to cost savings, and possible representations by a seller regarding the lack of cost justification" (FTC Br. 48-49). However, those references were to circumstances which could "indicate knowledge on the buyer's part" (346 U.S. at 80) and not evidence of the absence of cost justification, which the Court presupposed. It is only "the size of the discrepancy between cost differential and price differential"

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[21] Mr. Malone had simply calculated Borden's average historical costs of serving *all* customers from its obsolete Chicago plant (using total costs divided by the number of "points" sold) and applied this average to A&P in negotiating with it. He did not attempt to estimate the cost of giving A&P the least feasible service from Borden's new Woodstock plant or to compare that cost with the cost of serving other customers (A&P Br. 5-6).

(*ibid.*) that could possibly show the existence or non-existence of cost justification, and it is precisely that comparison which is wholly lacking here.

The cases cited by the FTC (at pp. 50-54) illustrate this point. In each, there were either cost/price comparisons to support a finding of lack of cost justification or the methods of service did not differ so that there was no need for such comparisons. In *D & N Auto Parts Co.*, 55 F.T.C. 1279 (1959), *aff'd sub nom. Mid-South Distributors* v. *FTC*, 287 F.2d 512 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961), the Commission concluded that price differences of as much as 20% could not be justified by savings resulting from central billing, which were the only significant savings involved (55 FTC at 1300-01).[22] *American Motor Specialities Co.*, 55 F.T.C. 1430, 1446 (1959), *aff'd*, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960), is to the same effect.

Similarly, in *Fred Meyer, Inc.* v. *FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd in part on other grounds*, 390 U.S. 341 (1968), cited at FTC Br. 51 and A&P Br. 34, the price reduction was not accompanied by any "changes in Meyer's costs or procedures which might provide cost savings for the suppliers" (359 F.2d at 364). Comparing the substantial price differentials (as much as one-third) to the evidence of negligible cost savings, the court of appeals concluded that "*Automatic Canteen*'s requirement of a cost/price comparison" was satisfied (*id.* at 365).

In *National Parts Warehouse*, 63 F.T.C. 1692 (1963), *aff'd sub nom. General Auto Supplies, Inc.* v. *FTC*, 346 F.2d 311 (7th Cir.), *cert. dismissed under Rule 60*, 382 U.S. 923 (1965), the court of appeals held that substantial evidence justified the Commission's finding of no cost justification (346 F.2d at 317).

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[22] The Fifth Circuit, in affirming the Commission's decision, noted that "for all practical purposes, the order and shipment were handled exactly the same" as those of competitors and that "at least three of the major Suppliers acknowledged they could not justify the price reductions on the basis of lower costs" (287 F.2d at 518-19).

There, the Commission had examined at some length, and rejected, claims that savings were realized on freight, billing and selling expenses (63 F.T.C. at 1731-35); it concluded that "the 'differing methods or quantities' in which respondents buy could not have possibly saved [the sellers] the differences between the prices" charged respondents and competing purchasers (63 F.T.C. at 1730).[23]

The cases on which the Commission relies indicate only that a detailed study of all of the seller's costs is not required in every instance to establish a lack of cost justification. But *Automatic Canteen* does require the FTC to examine not only the differences in prices, but the costs involved when the sales were to persons who were served differently or bought in different quantities; when this comparison shows a lack of cost justification, the Commission must show knowledge of that fact on the part of the buyer.[24] The Commission here seeks to reverse and revise this process; as proof of lack of actual cost justification, it relies on four indicia from Borden which allegedly imparted knowledge of that "fact" to A&P. None of these indicia, however, even approach any comparison between prices and costs to A&P and to others. They are treated in order below.

1. *Borden's "meeting competition" comment,* according to the Commission, is the "first and foremost" item of evidence that shows lack of cost justification (FTC Br. 57). The Commission boldly "translates" this comment into "Borden's statements that its private label prices could not be cost justified" (FTC Br. 58). The fact is that all the Borden negotiators testified that at no time did anyone from Borden

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[23] *American News Co.* v. *FTC,* 300 F. 2d 104 (2d Cir. 1962), is even more clearly inapposite. That case held that a buyer violated § 5 of the FTC Act by inducing and receiving from his supplier promotional allowances prohibited by § 2(d) of the Robinson-Patman Act, as to which there is no cost justification defense.

[24] As to this, *Automatic Canteen* stated: "A showing that the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference should be sufficient" (346 U.S. at 80).

ever state that its prices were not cost justified *or* that they would not be made generally available (A&P Br. 11, n.15).[25]

While there is some confusion as to just what the Borden representatives said on the subject of meeting competition, Mr. Schmidt of A&P took their use of " 'meeting competition' or 'beating competition' " as "salesman's talk", occasioned by their embarrassment that Borden's first bid was so much higher than the competing bid (A71a, 123a).[26] Accordingly, Schmidt did not understand it as anything sufficiently significant to mention to anyone else at A&P. Instead, in the same conversation, he asked for a letter of availability to other customers and was given the impression he would receive it; Mr. Minkler testified Borden fully intended to make the same prices and terms generally available (A&P Br. 11, n.15). Since Borden had also talked of cost savings (A 207a-208a, 279a-280a, 303a-304a) and never disclaimed cost justification, Mr. Schmidt simply had no reason to interpret any comment regarding meeting competition as a denial of either cost justification or availability to others.

2. *Borden's "cost data supplied . . . to A&P"* are also cited as evidence that there could be no cost justification here (FTC

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[25] The assertion that the final Borden private label proposal was "offered on a meeting competition basis only" (FTC Br. 57) is founded entirely on testimony by Ralph Minkler of Borden (at the hearing below, but not in his pre-complaint testimony or pre-hearing deposition) that he said this to Mr. Schmidt when he submitted Borden's final offer to A&P. By the time of the hearing, Borden was A&P's co-defendant in a parallel treble damage action, *Parker* v. *The Great Atl. & Pac. Tea Co.*, No. 71-C-3075 (N.D. Ill., filed Dec. 22, 1971) in which its primary defense was that Borden had a meeting competition defense based on its reliance on A&P.

[26] Previously, when Borden was offering only a $410,000 reduction for private label under stringent service terms (although the same prices would subsequently be made available to everyone buying Borden label products on regular delivery terms), Borden had stated that it would make "almost no profit" at those prices (FTC Br. 5) and that it could not see "how anyone can sell any cheaper" (FTC Br. 6). By this stage of the negotiations, therefore, the Borden salesmen felt they had to restore their credibility. This kind of seller "puffing", even if it included a cost justification disclaimer, would not be binding on A&P as proof of lack of cost justification (*Automatic Canteen Co. of America* v. *FTC, supra,* 346 U.S. at 80 n.24).

Br. 59-60). This refers to the same "Malone calculations" shown above (pp. 4-5, 18) to have been discredited before the Commission and in the court of appeals as evidence of cost justification (Pet. App. 24a, n.11). The unreliability of those calculations prepared by Borden for purposes of these negotiations with A&P is underscored by Borden's response to A&P's request for a "cost justification analysis" of a subsequent private label proposal (A1003a). Borden declined to furnish such information, stating: "A cost justification analysis must of necessity involve the disclosure of confidential data regarding our operation. . . . *It has never been our policy to disclose such information to any customer or competitor*" (A1006a, emphasis added).[27]

The Commission's efforts to rehabilitate the Malone data in this Court are hardly persuasive. Its "explanation" that Borden's July 1965 proposal showed twice the "gross profit per point" figure it had asserted earlier (A&P Br. 5, n.7) because the July offer was the "first one based on calculations reflecting A&P's willingness to accept reduced service terms" (FTC Br. 60, n.43) is demonstrably erroneous. The initial private label offer submitted by Borden in February 1965 included all of the reduced service terms (A570a). The May and July 1965 proposals were for the balance of the area within A&P's Chicago Unit (outside the Chicago-Calumet region) and were on the same reduced service terms (A226a, 574a-589a).[28] Further, Mr. Schmidt's testimony that he had thought the deceased Mr. Malone was an honest salesman does not supply the requisite cost comparisons (FTC Br. 59, n.42).

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[27] While some of the data cited by the FTC (*e.g.*, CX 87 and 206, A804a-806a and 836a-839a, at FTC Br. 60, n.44) was not shown to A&P (A35a-36a), all of it was deficient in that no attempt was ever made to ascertain and compare the cost of the minimal service given to A&P with the cost of serving other customers. None of this data was relied on by the FTC or the court of appeals as showing lack of cost justification.

[28] The July 1965 submission was simply more detailed than the May offer in that it showed a range of prices for each product in several regions, depending upon whether weekly deliveries were to be on a three to a six-day basis (A106a-107a, 226a, 598a-618a).

In short, not only does the Borden "cost data" fail as proof of lack of cost justification, it reflects on the credibility and reliability of all the Borden representations.

3. *A&P's "trade experience" with Borden* is also said to show a lack of cost justification because (i) in January 1966 Borden made available a "limited service option" to its other customers, but at a smaller discount, and (ii) A&P did not acquiesce in Borden's 1966-67 request for a price increase of a few mills (FTC Br. 61-62). Regretably, such conclusory allegations require less space than their refutation.[29]

The so-called "January 1966 limited service option" does not negate cost justification. This was a paragraph in a schedule of volume discounts (of up to 26%) which allowed an additional 2% discount for certain service reductions, leaving unaffected other services and allowances that A&P had given up (CX 138, A832a).[30] This schedule was not disseminated to chain stores (A121a), and no proof was adduced that A&P knew about it. Only one of the allegedly disfavored Borden customers who were called as witnesses was even aware of this volume discount schedule and its "limited service option" (A344a, 350a, 365a, 377a, 388a, 407a, 417a, 424a) and other allegedly disfavored customers received discounts which were more

[29] The FTC disputes the justification for A&P's reliance on its trade experience with the "2-2-2" formula even though Borden had followed that formula precisely in submitting a private label proposal to A&P in New York (A&P Br. 12). It argues that Malone's "cost figures" showed that wage rates were higher in Chicago than in New York State (FTC Br. 60, n.43). The extent to which this Malone data (prepared to convince A&P that it "was getting a good deal", A60a, 81a-84a) might affect the 2-2-2 formula is not clear from the record, but in any event it did not relate to Borden's new Woodstock plant which was to serve A&P.

[30] A customer who accepted this "limited service option" would, unlike A&P, continue to receive the services of Borden's salesmen plus "merchandising materials, price promotions, demonstrators and special displays" (A781a), as well as competitive and other allowances (A200a, 333a-336a) and the benefit of the Borden label and Borden advertising, all of which were not available to A&P.

liberal than called for by this schedule and were paid on an inconsistent and unexplained basis (A536a-539a).

The Commission's brief also distorts the record as to the actual service differences between A&P and Borden's other customers. In our main brief, we stated (with record references) that *all* of the allegedly injured customers in Illinois received full service delivery as did *all* of the allegedly injured customers in Indiana except one store, which received allowances not provided to A&P (A&P Br. 31, n.31). The Commission's brief weakens this and asserts that there were stores "that did *not* receive more service than A&P [and] paid higher prices" (FTC Br. 61-62, n.45; emphasis in original). The source cited is a Borden employee who testified that deliveries to one non-A&P store in Hammond, Indiana, were physically similar to those to A&P stores except that, while A&P stores pre-ordered, the Borden driver would enter the non-A&P store, check the stock in the dairy case to see what was "on hand", refer to his route book to see what was normally required, and then go back to his truck and furnish the store with the difference (A195a). These steps are obviously more costly and involve more service than merely dropping off a pre-packaged order while picking up an order slip for the next day's delivery.[31]

The Commission next notes that A&P accepted a price increase of a few mills on brand label products (to make up for increased container and labor costs) while resisting the same increase on private label products (FTC Br. 62). Again, this argument is unrelated to the comparative cost of serving A&P and other customers. A&P resisted these requested increases because the container costs had increased before the private label negotiations were concluded (A802a) and because Bor-

[31] Mr. Szczepaniak, an assistant route foreman of Borden's Hammond, Indiana branch, evidenced no knowledge of the cost or economic significance of A&P's pre-ordering or giving up advertising services or competitive and other allowances available to this Hammond store and A&P's other competitors but not to A&P (compare A&P Br. 31, n.31).

den's labor costs in serving A&P were less than in serving others.[32] Moreover, we are here again dealing with "a matter of mills" and the kind of seller's statement which does not establish that the prices to A&P could not be cost justified.

4. *Borden's letter of legal assurances* is the fourth and final alleged "proof" of lack of cost justification (FTC Br. 62-63). Dated October 1, 1965, it stated: "We wish to assure you [A&P] that our prices are proper under applicable law and we are prepared to defend these prices" (A&P Br. 11). It is difficult to conceive how this letter could be notice by Borden that its prices were not cost justified, particularly when neither it nor any other document or statement so limited Borden's assurances. Borden presumably knew when it wrote this letter (as A&P did not) that it was about to reduce its regular prices so as to eliminate half the discount being offered to A&P. It could well have thought that it could cost justify the other half (although it was never called upon to do so) and in any event it intended to and did offer the same prices to others, as A&P expected it would.[33]

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[32] Since A&P was receiving minimal service on all products delivered to it, whether private label or Borden label, it might have been more logical for A&P to have resisted the labor portion of the price increase on all products.

[33] Contrary to the Commission's argument that "A&P has not identified any customer who received equally low prices from Borden" (FTC Br. 13, n.15), the record shows several such instances which were repeatedly pointed out below. In November 1965, Borden solicited the business of Kroger's 64 stores in the Chicago area, offering the same prices that A&P was paying for private label, but Kroger rejected the proposal because those prices were too *high* (A158a-165a, 167a-172a, 179a-181a, 1008a-1017a). Borden also made similar private label solicitations to National Tea and K Mart (A543a-547a, 1041a-1064a). Consolidated Foods bought Borden brand products at a discount from "list" of 37% (A46a, 540a-541a) as compared with 37.9% off "list" A&P was then receiving on private label under minimum service conditions (A1183a-1192a). Moreover, in September 1968, Eagle Food Centers bought from Borden at prices *lower* than those Borden was charging A&P; A&P became aware of this only when Borden gave the A&P stores in Eagle's area a reduction in private label prices to bring them in line with Eagle (A175a, 237a, 285a-286a, 1018a-1040a).

At the hearing below, FTC counsel took a quite different view of Borden's letter. They strenuously opposed A&P's introduction of it (A95a-100a), and did not attempt to introduce any "customary letter of availability" (FTC Br. 62). This "letter of assurances" was copied verbatim in other letters from Borden to A&P in which Borden interpreted its phrase "prices are proper under applicable law" as covering "any implications that may be required as to availability under the Robinson-Patman Act" (A&P Br. 11, n.16). These facts expose the absurdity of the FTC's attempt to convert Borden's letter of legal assurances into proof of an absence of cost justification.

CONCLUSION

The Commission's attempt to reverse *Automatic Canteen,* and to extend *Kroger* to condemn the honest buyer, should not be countenanced for a variety of reasons stated above and in our main brief. The most serious of these is that, if the FTC's efforts were to succeed here, it would artificially restrain the normal give-and-take of the bargaining process, and would result in higher prices at both wholesale and consumer levels.

Instead, the judgment below should be reversed and the case remanded for dismissal of the complaint.

Dated: New York, New York
November 8, 1978

Respectfully submitted,

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AUG 7 - 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE SMALL BUSINESS LEGISLATIVE COUNCIL

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IN THE

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THE FEDERAL TRADE COMMISSION,

Respondent.

MOTION OF SMALL BUSINESS LEGISLATIVE COUNCIL FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Small Business Legislative Council (SBLC) hereby moves, pursuant to Rule 42, Rules of the United States Supreme Court, for leave to file the annexed brief *amicus curiae* in support of the rulings of the Federal Trade Commission and the opinion of the United States Court of Appeals for the Second Circuit, in the above-captioned proceedings. Consent to the filing of this brief *amicus curiae* has been withheld by counsel for the Great Atlantic & Pacific Tea Company.

Small Business Legislative Council is affiliated with the National Small Business Association, a non-profit, tax-exempt trade association organized and operating under the laws of Ohio, whose purpose is to represent and serve the needs of its constituent members before Congress and agencies of the federal government. The SBLC membership is comprised of a broad spectrum of industries and associations which constitute a substantial and representative portion of the small business community of this country.

The accompanying brief urges this Court to uphold the decision of the United States Court of Appeals for the Second Circuit and by so doing, to reaffirm its commitment to enforcement of one basic component of our antitrust laws, Section 2 of the Clayton Act, as amended. Small Business Legislative Council believes it can bring to this case a perspective — not fully represented by the parties — which may assist this Court in its consideration of the case.

Accordingly, SBLC respectfully requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1977

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Respondent.

INTEREST OF AMICUS CURIAE

Small Business Legislative Council is affiliated with the National Small Business Association, a trade organization whose membership is comprised of various segments of the small business community.

SBLC was organized in 1977 for the sole purpose of bringing to the attention of Congress and federal instrumentalities, including this Court, the common concerns of the small business community with respect to issues affecting the survival, competitiveness, and growth of the small business sector of the American

economy. The issues in this case typify the issues in which SBLC becomes involved. The 56 associations which are members of SBLC (Appendix A) represent manufacturing, wholesaling, retailing, service, construction, the professions — in fact more than 1,000 of the 1,200 Standard Industrial Classifications established by the Department of Commerce. Each SBLC member represents predominantly small business. In fact, the SBLC By-Laws require that, to be eligible for membership, 70 percent of the dues income of the member association be derived from firms classified as small under size standards established by the Small Business Administration. Thus, SBLC membership represents approximately 4 million small business firms.

SBLC appears frequently through counsel at appropriate Congressional hearings to offer the perspectives of small business with respect to the competitive advantages to the national economy inherent in vigorous and active enforcement of the antitrust laws — most particularly the discriminatory pricing prohibitions in the Robinson-Patman amendment to the Clayton Act, 15 U.S.C. § 13. In a variety of ways, SBLC has expressed support for and urged that the Federal Trade Commission be committed to the uninhibited exercise of its statutory powers as bestowed under the laws relating to discriminatory pricing.

This Court has undoubtedly noticed the determined campaign by certain high ranking officials in the Department of Justice, beginning in 1972, to seek

the outright repeal or emasculation by amendments of the Robinson-Patman Act. Many SBLC members vigorously countered this campaign. It is recognized that their efforts both in the legislative and executive branches of our government brought to a halt the anti-Robinson-Patman campaign.

Much of the four decades of history of the Robinson-Patman Act could be characterized as ineffective enforcement by the agencies of government and weakening the Act's force and effect by court decisions. This case now comes full circle in spelling-out the central concerns so persuasive to Congress forty-two years ago in its enactment of Robinson-Patman, namely: when preferences are granted suppliers after powerful buyers pressure them, equality of opportunity is denied to small business competitors.

The interest of the SBLC membership in this case is not in the economic health *per se* of two titans, A & P and Borden, but rather in the fall-out from this case if the decision of the United States Court of Appeals for the Second Circuit is not upheld. Any expansion of the "meeting competition" defense cannot help but further weaken the competitive position of the small business community.

It is the large firm, not the small firm, that invariably receives discriminatory price reductions. This advantage, coupled with the "deep pocket" market power already enjoyed by the large firm, contributes to even greater concentration and deprives the country of one essential check to monopoly: the existence of an active, growing, viable small business sector.

Vitally affected by the decision in this case is the very foundation of private enterprise: the small nurseryman, the steel distributor, the bookseller, the baker, the candy wholesaler, the menswear retailer, the retail druggist, the dealer in office machines of hardware or shoes or tires—in fact for the 98 percent of all enterprises in America who make jobs for almost 60 percent of the nation's private, non-agricultural work force.

Because Robinson-Patman and its parent, the Clayton Act, were designed to check monopoly in its incipiency, this case presents another opportunity for this Court to serve the public interest by affirming the policies underlying the Robinson-Patman Act so that small business be permitted to compete fairly and effectively based on efficiency, against the size and power of its larger industrial counterparts as purchasers of goods and services in the marketplace.

STATEMENT

The case presents a classic illustration of the overreaching buyer whose purchasing power enables it to extract discriminatory prices from a dependent seller at the expense of other smaller buyers. The economic evils associated with the overt anticompetitive practices of the large chain stores, including A & P, of acquiring unlawfully preferential prices from vendors whose economic existence is largely dependent upon these predatory buyers,

caused Congress to amend the Clayton Act so as to include Section 2(f) thereof, commonly known as the "buyer inducement" provision of the Robinson-Patman Act.

Although the Robinson-Patman Act has not been without critics since its enactment into law in 1936, its efficacy as a significant piece of federal regulatory legislation has been recognized repeatedly by this Court over the years, and most recently in *Exxon v. Maryland*, ____ U.S. ____, 57 L.Ed. 2d 91, 98 S.Ct. ____ (June 14, 1978).[1]

A & P now comes before this Court, in an effort to have engrafted onto Section 2(b) of the Act an addition which would, in effect, fatally undermine the buyer liability provisions embodied in Section 2(f) of the Act. According to A & P, a buyer who is charged with a 2(f) violation for knowingly inducing or receiving a price discrimination should be permitted to successfully invoke the "meeting competition" defense normally

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[1] *Exxon* involved a challenge to a Maryland statute on various grounds, among them that it was in conflict with Section 2(b) of the Robinson-Patman Act, the statutory "meeting competition" defense. In holding that the Maryland Statute was not pre-empted by Section 2(b), this Court rejected Exxon's argument that 2(b) established a federal right to engage in discriminatory pricing in certain situations in stating: "The proviso in § 2(b) of the Robinson-Patman Act is merely an exception to that statute's broad prohibition against discriminatory pricing. It created no new federal right; quite the contrary, *it defined a specific, limited defense, and even narrowed the good-faith defense that had previously existed* [under Section 2 of the original Clayton Act]." (Emphasis added).

raised by a seller charged with 2(a) liability even when that buyer *knew for a fact* the pricing offer he induced from the seller *by way of deception and misrepresentation* was substantially lower than the only other competing offer. As already decided by the Federal Trade Commission and affirmed by the United States Court of Appeals for the Second Circuit, there is simply no basis in law or reason for this novel and somewhat surprising assertion.

Nobody would quarrel with the legitimacy of the rule that a buyer is not liable under Section 2(f) if he is unaware that the lower price he induces cannot be protected by the meeting competition defense. Indeed, this Court so held in *Automatic Canteen Co. of America v. Federal Trade Commission,* 346 U.S. 61, 74 (1953). Likewise, a seller's exoneration from 2(a) liability via a successful meeting competition defense does not necessarily absolve a buyer from 2(f) liability, if the *buyer* knows that the induced discriminatory price is not *in fact* sheltered by the meeting competition defense. *Kroger Co. v. Federal Trade Commission,* 438 F.2d 1372, 1377 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971).

Economic realities provide logical support for the rule articulated in the *Kroger* case. As expressed by the Federal Trade Commission in its opinion in the instant case, proof of a seller's bad faith is not a prerequisite to a finding that the meeting competition defense is unavailable to a buyer — precisely because the buyer is frequently better positioned to ascertain whether or not the defense is properly maintainable by the seller.

See, e.g., Automatic Canteen, supra, at 79 n. 23. It is not difficult to conceive a situation where a seller, under extreme pressure to accommodate a buyer whose economic power in the market for the purchased product is demonstrably greater than that of his smaller competitors, offers a price to that buyer believing in good faith that such offer meets competition, when in reality the buyer is in sole possession of the information which would determine if the seller has met or beaten competition. The instant case is such a situation, and was so recognized by both tribunals which have already ruled that A & P knew that Borden's final bid substantially bettered the bid of Borden's only other competing seller, Bowman Dairy.[2] Moreover, the Court of Appeals correctly identified A & P as "one of the buyers Congress was concerned with, when it pressured Borden into a second bid which in fact went beyond the bounds of 'meeting competition' and went a long way below it." (Pet. Brief, 19a).

Notwithstanding the evidence adduced below that A & P's egregious conduct as the "principal malefactor" in its negotiations with Borden brought this case

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[2] *Automatic Canteen, supra,* at 79 also emphasized the need to look behind the formalistic approach which A & P adopted below and reasserts before this Court:

> "If the requirement of knowledge in § 2(f) has any significant function, it is to indicate that the buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense from the seller, nevertheless proceeded to exert pressure for lower prices."

squarely within the parameters of the *Kroger* case, A & P still maintains that it was improperly deprived of the meeting competition defense. We submit that the reasoning of A & P in reaching this strained conclusion is spurious and circular. Stated simply, A & P argues that because Borden was not charged with a Section 2(a) violation and would have been able to successfully defend against that allegation on meeting competition grounds in any event (a conclusion clearly not supported by the findings of either the Federal Trade Commission or the Court of Appeals), it was error for the Court of Appeals to predicate A & P's 2(f) liability upon the *Kroger* case.

Rather, what occurred below was that the indefensible behavior of A & P in extorting a knowingly below-competition bid from Borden was found to be within the category of misconduct explicitly condemned by both *Kroger* and *Automatic Canteen*. Therefore, the rule that Section 2(f) liability is derivative from Section 2(a) liability was properly held to be inapplicable. Finally, the Court of Appeals held that the meeting competition defense was unavailable to A & P because its misconduct precluded A & P from wearing the good faith cloak under which A & P assumes Borden could have taken shelter —an assumption about which the Commission expressed grave doubts (Pet. Brief, 44a, n. 19).

Given these doubts, it is difficult to understand how A & P can blithely assert that the Court of Appeals "conceded the meeting competition defense to Borden" (Pet. Brief 24) when the only reference made by the

Court of Appeals to the availability of the defense to Borden was that "...Borden may well have been *under the impression* that the terms of its final offer merely met the Bowman bid..." (Pet. Brief 19a). In characterizing Borden's state of mind as it did, the Court of Appeals merely adheres to the rule that the meeting competition defense requires more than conjecture on the part of the seller that it has met competition. Indeed, the defense calls for some factual basis for the seller's reasonable belief that his price would meet that of his competitor. *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945).

Perhaps more important is the conclusion implicit in the Court of Appeals' treatment of Borden's state of mind that *whatever* Borden believed was irrelevant because A & P's statements of inducement to Borden that its initial offer was "not in the ballpark" and that a $50,000 reduction "would not be a drop in the pocket" were tantamount to affirmative misrepresentation. Accepting the contention of A & P that its intentions in making such statements to Borden should be judged only on the basis that they were literally true when made is to disregard plain fact. A & P was well aware of its superior bargaining power and ability to coerce discriminatory price concessions from Borden at the outset of the negotiations between the parties. A & P knew that the new dairy processing facility which Borden had just built in the Chicago area was largely dependent upon Borden's willingness to succumb to A & P's pricing demands — even if Borden had to beat its competition to do so.

From the point of view of *amicus*, the opinion of the Court of Appeals is most significant in its recognition of the competitive disadvantages imposed upon small business enterprises by large buyers that Section 2(f) of the Robinson-Patman Act was designed to prevent. As the Court of Appeals wisely points out, adoption of A & P's views regarding the buyer's use of the meeting competition defense would only serve to emasculate Section 2(f), and the following scenario would result:

> "...large buyers could consistently play one seller off against another to the point where all bids are below sellers' costs and then in reliance upon the sellers' potential good faith and meeting competition defenses, thus vindicate the final price. Such tactics would ultimately result in the acquisition of increased, and perhaps overwhelming market power to the large buyer, all to the competitive detriment of the buyer's competitors. In addition, toleration of such abusive behavior by buyers would, in most cases, favor the largest seller, the ones most able to bear the losses resulting from such a competitive situation, with the further result of ultimate anticompetitive effects among sellers."

CONCLUSION

In light of the record of these proceedings, with special reference to the perceptive and accurate economic analysis of the United States Court of Appeals for the Second Circuit, it is respectfully suggested that the most appropriate action that could be taken by this Court in this matter would be to dismiss the Writ of Certiorari as having been improvidently granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

TRADE AND PROFESSIONAL ASSOCIATIONS COMPRISING THE SMALL BUSINESS LEGISLATIVE COUNCIL

American Association of Nurserymen
Washington, D.C.

Association of Diesel Specialists
Kansas City, Missouri

Association of Physical Fitness Centers
Bethesda, Maryland

Association of Steel Distributors, Inc.
Cleveland, Ohio

Automotive Warehouse Distributors Association, Inc.
Kansas City, Missouri

Building Service Contractors Association International
McLean, Virginia

Christian Booksellers Association
Colorado Springs, Colorado

Direct Selling Association
Washington, D.C.

Electronic Representatives Association
Chicago, Illinois

Independent Bakers Association
Washington, D.C.

Independent Sewing Machine Dealers of America, Inc.
Hilliard, Ohio

International Franchise Association
Washington, D.C.

Local and Short Haul Carriers National Conference
Washington, D.C.

Machinery Dealers National Association
Silver Spring, Maryland

Manufacturers Agents National Association
Irvine, California

Marking Device Association
Evanston, Illinois

Menswear Retailers of America
Washington, D.C.

Narrow Fabrics Institute, Inc.
New Rochelle, New York

National Association for Child Development & Education
Washington, D.C.

National Association of Brick Distributors
McLean, Virginia

National Association of Catalog Showroom Merchandisers
New York, New York

National Association of Independent Lumbermen
Arlington, Virginia

National Association of Men's and Boys' Apparel Clubs, Inc.
Atlanta, Georgia

National Association of Plastics Distributors, Inc.
Devon, Pennsylvania

National Ass'n of Plumbing-Heating-Cooling Contractors
Washington, D.C.

National Association of Realtors
Chicago, Illinois

National Association of Retail Druggists
Washington, D.C.

National Association of Trade & Technical Schools
Washington, D.C.

National Beer Wholesalers' Association of America, Inc.
Falls Church, Virginia

National Building Material Distributors Association
Chicago, Illinois

National Candy Wholesalers Association, Inc.
Washington, D.C.

National Concrete Masonry Association
McLean, Virginia

National Electrical Contractors Association
Bethesda, Maryland

National Family Business Council
West Bloomfield, Michigan

National Fastener Distributors Association
Columbus, Ohio

National Hay Association, Inc.
Jackson, Michigan

National Home Furnishings Association
Washington, D.C.

National Home Improvement Council
New York, New York

National Independent Dairies Association
Washington, D.C.

National Independent Meat Packers Association
Washington, D.C.

National Insulation Contractors Association
Washington, D.C.

National Office Machine Dealers Association
Zanesville, Ohio

National Office Products Association
Alexandria, Virginia

National Paper Trade Association, Inc.
New York, New York

National Parking Association
Washington, D.C.

National Patent Council
Arlington, Virginia

National Pest Control Association
Vienna, Virginia

National Precast Concrete Association
Indianapolis, Indiana

National Shoe Retailers Association
New York, New York

National Small Business Association
Washington, D.C.

National Society of Public Accountants
Washington, D.C.

National Tire Dealers & Retreaders Association, Inc.
Washington, D.C.

National Tcol, Die & Precision Machining Association
Washington, D.C.

Printing Industries of America, Inc.
Arlington, Virginia

Small Business Service Contractors Association
Washington, D.C.

The Roller Skating Rink Operators Association
Lincoln, Nebraska

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

OPPOSITION TO MOTION OF SMALL BUSINESS LEGISLATIVE COUNCIL FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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IN THE

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OCTOBER TERM, 1977

No. 77-654

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FEDERAL TRADE COMMISSION,

Respondent.

OPPOSITION TO MOTION OF SMALL BUSINESS LEGISLATIVE COUNCIL FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The undersigned counsel for The Great Atlantic & Pacific Tea Company, Inc. ("A&P") received by mail on August 9, 1978 a "Motion for Leave to File Brief Amicus Curiae and Brief of Amicus Curiae Small Business Legislative Council". The movant ("SBLC") asserts that consent to the filing of the brief "has been withheld" by counsel for A&P. While we have no record that counsel for A&P was asked to consent previously, we oppose the motion.

The Solicitor General is fully capable of presenting the Government's side of this case, and we disagree with SBLC's suggestion that its intervention would assist the Court in its consideration of this case. On the contrary, SBLC's proposed brief is basically a collection of invective in which A&P is variously described as a "malefactor" guilty of "indefensible behavior" and even extortion. If

SBLC were allowed to inject these characterizations into this proceeding, we submit the result would be to complicate them by requiring an appropriate response from A&P showing that the record will not support such conclusions.

Dated: New York, New York
August 11, 1978

Respectfully submitted,

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MOTION FILED
SEP 25 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

vs

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION OF SAMUEL E. PARKER AND LYLA E. PARKER FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AS AMICUS CURIAE.

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IN THE

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THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION OF SAMUEL E. PARKER AND LYLA E. PARKER FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AS AMICUS CURIAE.

May It Please the Court:

Samuel E. Parker and Lyla E. Parker respectfully move this Court for leave to file the accompanying brief in this case as *Amicus Curiae.*

The consent of the Solicitor General, as Attorney for the Respondent herein, the Federal Trade Commission, has been obtained, but the attorney for the Petitioner, The Great Atlantic & Pacific Tea Company, Inc., has refused to consent to the filing of a brief by Samuel E. Parker and Lyla E. Parker, as *Amicus Curiae.*

STATEMENT OF INTEREST.

This case relates to sales of milk and other dairy products by Borden, Inc. ("Borden") to the Petitioner, The Great Atlantic & Pacific Tea Company, Inc. ("A & P"), during the period November 1, 1965 through February, 1972 (the "contract period"), in a certain multistate area comprising twenty-six counties of Northern Illinois and seven counties of Northwestern, Indiana (the "contract area"). The contract area included Cook County, Illinois, *i.e.,* Chicago and its principal suburbs.

During this period, and in this area, Borden sold milk and other dairy products, for resale, to two groups of retail grocery stores:

a. Some 235 retail grocery stores owned and operated by the Petitioner, A & P.

b. Some 200 or more retail grocery stores owned by independent grocers, including the Applicants, Samuel E. Parker and Lyla E. Parker.

During this period, and in this area, sales of milk and other dairy products by Borden to A & P were made pursuant to a certain "private label" supply contract entered into between Borden and A & P, on or about November 1, 1965. The prices which Borden charged A & P pursuant to this contract were substantially less than those which it charged the independent grocers.

The contract formalized a certain offer made by Borden and accepted by A & P. At the time Borden made this offer, it informed A & P that the offer was being extended for the purpose of meeting competition in the form of an existing offer or offers which A & P then had in its possession. A & P accepted this offer of Borden with knowledge that Borden thereby had granted it a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact.

Pursuant to a further understanding between Borden and A & P, the milk and other dairy products purchased under the contract were sold to the public at the same price as milk and other dairy products purchased under the Borden label. That is to say, the lower price, or discount, received by A & P pursuant to the contract was not "passed on" to the consuming public, but was retained by the Petitioner, A & P. The purpose of this arrangement was to sustain and maintain the retail price of milk and other products in the contract area.

The Respondent, Federal Trade Commission, and the Court of Appeals for the Second Circuit, have held that by this contract, the Petitioner, A & P, induced and received, in violation of Subsection 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, price discriminations forbidden by Subsection 2(a) of that Act. 15 U. S. C. § 13(a, f).

The applicants Samuel E. Parker and Lyla E. Parker, owned a retail grocery store in Chicago, Illinois. Throughout the contract period they purchased milk and other dairy products from Borden. Throughout this period, they were in competition with three retail grocery stores owned by the Petitioner, A & P.

In December, 1971, the applicants, Samuel E. Parker and Lyla E. Parker, commenced suit against the petitioner, A & P, and Borden. They brought this suit individually and as representative plaintiffs on behalf of the 200 other independent grocers in the contract area who, during all or part of the contract period, also had purchased milk and other dairy products from Borden. Class certification was denied by the district court on August 9, 1978. The individual suit of the Parkers is presently pending in the United States District Court for the Northern District of Illinois as Cause No. 71 C 3075. It will be referred to herein as the *Parker* suit.

Count I of the Complaint in the *Parker* suit was based upon, and followed as closely as possible, Count II (the Robinson-Patman Act Count) in the Federal Commission's Complaint against the Petitioner, A & P, in this case.

Under Section 5 of the Clayton Act, 15 U. S. C. § 16(2), the decisions of the Federal Trade Commission and the Court of Appeals for the Second Circuit, in this case, if affirmed by the Court, will be *prima facie* evidence of almost every element of proof necessary to establish the liability of A & P under Count I of the *Parker* suit.

Clearly, the Applicants, Samuel E. Parker and Lyla E. Parker, have a most substantial interest in this case.

PURPOSE OF BRIEF AS AMICUS CURIAE.

The Applicants believe that the brief of the Respondent, Federal Trade Commission, will not make, or will not sufficiently emphasize, the following points which they believe should be considered by the Court in its disposition of this case.

1. The Court has held that the Robinson-Patman Act is to be construed so as to effectuate "the broad goals which Congress intended it to effectuate." *FTC* v. *Fred Meyer, Inc.*, 390 U. S. 341, 349, 88 S. Ct. 904 (1968). Specifically, "[T]he Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *FTC* v. *Henry Broch & Co.*, 363 U. S. 166, 168, 80 S. Ct. 1158, 1160, 4 L. Ed. 2d 1124 (1960); *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 543-544, 80 S. Ct. 1267, 4 L. Ed. 2d 1385 (1960).

2. The legislative history of the Robinson-Patman Act, and particularly the Federal Trade Commission Report on chain store practices upon which Congress based that Act, singled out for condemnation the very practices by which the Petitioner, A & P, extracted from Borden the illegal, discriminatory discounts here involved. *Federal Trade Commission, Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess. 24, 26 (1935).

3. The Petitioner, A & P, blandly asserts that the decision of the Court of Appeals would operate "to deprive consumers of the benefits" of "bargaining by buyers and competition among

sellers." Pet.'s Br. 14. Nothing could be further from the truth. A & P's customers derived no benefit whatsoever from the transactions here at issue. By agreement between A & P and Borden, the price discounts received by A & P under the contract were not "passed on" but were retained by A & P.

4. It has been recognized, particularly in the retail grocery field, that a price discrimination in favor of a large chain can have a most adverse affect on its competitors even though the chain does not use the discretionary price discounts it receives to undersell those competitors. *Foremost Dairies, Inc.* v. *FTC*, 348 F. 2d 674, 680 (5th Cir. 1965), *cert. denied*, 382 U. S. 959, 86 S. Ct. 435, 15 L. Ed. 2d 362 (1965); *National Dairy Products Corp.* v. *FTC.*, 395 F. 2d 517, 521-522 (7th Cir. 1968), *cert. denied*, 393 U. S. 977, 89 S. Ct. 444, 21 L. Ed. 2d 438 (1968).

5. The Petitioner, A & P, was not in good faith when it accepted the Borden offer. A & P then believed that the Borden offer "beat," and did not merely "meet," the only competitive offer which A & P had received. A & P was also on Notice that Borden did not have a cost justification defense for its offer.

WHEREFORE, Applicants pray that they may be permitted to file instanter, the accompanying *Amicus Curiae* Brief in support of the Decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654.

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR SAMUEL E. PARKER AND LYLA E. PARKER AS AMICUS CURIAE.

May It Please the Court:

This Amicus Curiae Brief is submitted on behalf of Samuel E. Parker and Lyla E. Parker, individually, in support of a decision of the Federal Trade Commission, affirmed and ordered enforced by the United States Court of Appeals for the Second Circuit, against the Petitioner.

Consent to the filing of this brief has been obtained from the Respondent pursuant to Rule 42(2). Consent to the filing of this brief was refused by the Petitioner. A Motion for Leave to File, pursuant to Rule 42(2), has been presented to the Court together with this brief.

STATEMENT OF INTEREST.

This case relates to sales of milk and other dairy products by Borden, Inc. ("Borden"), to the Petitioner, The Great Atlantic & Pacific Tea Company, Inc. ("A & P"), during the period November 1, 1965 through February, 1972 (the "contract period"), in a certain multistate area comprising twenty-six counties of Northern Illinois and Seven Counties of Northwestern, Indiana (the "contract area"). The contract area included Cook County, Illinois, *i.e.*, Chicago and its principal suburbs.

During this period, and in this area, Borden sold milk and other dairy products, for resale, to two groups of retail grocery stores:

a. Some 235 Retail Grocery Stores owned and operated by the Petitioner, A & P.

b. Some 200 or more Retail Grocery Stores owned by independent grocers, including Amicus, Samuel E. Parker and Lyla E. Parker.

During this period, and in this area, sales of milk and other dairy products by Borden to A & P were made pursuant to a certain "Private Label" supply contract entered into between Borden and A & P, on or about November 1, 1965. The prices which Borden charged A & P pursuant to this contract were substantially less than those which it charged the independent grocers.

The contract formalized a certain offer made by Borden and accepted by A & P. At the time Borden made this offer, it informed A & P that the offer was being extended for the purpose of meeting competition in the form of an existing offer or offers which A & P then had in its possession. A & P accepted this offer of Borden with knowledge that Borden thereby had granted it a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact.

Pursuant to a further understanding between Borden and A & P, the milk and other dairy products purchased under the contract were sold to the public at the same price as milk and other dairy products purchased under the Borden label. That is to say, the lower price, or discount, received by A & P pursuant to the contract was not "passed on" to the consuming public, but was retained by the Petitioner, A & P. The purpose of this arrangement was to sustain and maintain the retail price of milk and other products in the contract area.

At the time the contract was made, sales of milk and other dairy products by Borden to A & P were approximately 55% of all wholesale sales of such products by Borden in the contract area. Loss of the A & P business would have caused a plant recently erected by Borden at Woodstock, Illinois, to operate at a substantial loss. The price discounts granted to the Petitioner, A & P, by Borden, pursuant to the contract, were in response to a threat by A & P that it would take its business elsewhere unless it received a satisfactory price reduction from Borden.

The Respondent, Federal Trade Commission, and the Court of Appeals for the Second Circuit, have held that by this contract the Petitioner, A & P, induced and received, in violation of Subsection 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, price discrimination forbidden by Subsection 2(a) of that Act. 15 U. S. C. § 13(a, f). *Great Atlantic & Pacific Tea Company, Inc.* v. *Federal Trade Commission,* 557 F. 2d 971 (2d Cir. 1977).

Amicus, Samuel E. Parker and Lyla E. Parker, owned a Retail Grocery Store in Chicago, Illinois. Throughout the contract period, they purchased milk and other dairy products from Borden. Throughout this period, they were in competition with three Retail Grocery Stores owned by the Petitioner, A & P.

In December, 1971, Amicus, Samuel E. Parker and Lyla E. Parker, commenced suit against the Petitioner, A & P and

Borden. They brought this suit individually and as representative plaintiffs on behalf of the 200 other independent grocers in the contract area who, during all or part of the contract period, also had purchased milk and other dairy products from Borden. The District Court denied class certification, but allowed the individual action of the amicus, Samuel E. Parker and Lyla E. Parker, to stand. This suit is presently pending in the United States District Court for the Northern District of Illinois as Cause No. 71 C 3075. It will be referred to herein as the *Parker* suit.

Count I of the Complaint in the *Parker* suit was based upon, and followed as closely as possible, Count II (the Robinson-Patman Act Count) in the Federal Trade Commission's Complaint against the Petitioner, A & P, in this case.

Section 5 of the Clayton Act, 15 U. S. C. § 16(a), provides in pertinent part as follows:

> "(a) A final judgment or decree heretofore or hereafter rendered in any Civil or Criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against defendant under said laws . . ., as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

This Section has been held applicable to decisions of the Federal Trade Commission, which, as here, have been sustained and ordered enforced by a Court of Appeals. *Purex Corp. Ltd.* v. *Proctor & Gamble Co.*, 453 F. 2d 288 (9th Cir. 1971), *cert. denied*, 405 U. S. 1065, 92 S. Ct. 1493, 31 L. Ed. 2d 795 (1972); *Farmington Dowel Products Corp.* v. *Forster Mfg. Co.*, 421 F. 2d 61 (1st Cir. 1969).

Under Section 5 of the Clayton Act, the decisions of the Federal Trade Commission and the Court of Appeals for the Second Circuit, will be *prima facie* evidence of almost every element of proof necessary to establish the liability of A & P under Count I of the *Parker* suit.

We accordingly submit this Amicus Brief in support of the Decision of the United States Court of Appeals for the Second Circuit.

ARGUMENT.

I.

The Robinson-Patman Act Is To Be Construed So as to Effectuate the Congressional Intent of Proscribing Certain Objectional Business Practices, Among Them the Very Acts of Which the Petitioner, A & P, Stood Accused in This Case, and of Which It Was Found Guilty by the FTC and the Court of Appeals.

In *FTC* v. *Fred Meyer, Inc.*, 390 U. S. 341, 349-350 (1968), this Court stated:

> "Conceding that the Robinson-Patman Amendments by no means represent an exemplar of legislative clarity, we cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate. See, e.g., *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 516-521, 83 C. Ct. 358, 365-368, 9 L. Ed. 2d 466 (1963); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co., cert. denied*, 326 U.S. 773, 66 S. Ct. 231, 90 L. Ed. 467 (1945). We start with the proposition that '[T]he Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' *FTC* v. *Henry Broch & Co.*, 363 U.S. 166, 168, 80 S. Ct. 1158, 1160, 4 L. Ed. 2d 1124 (1960). The role within the statutory scheme which Congress intended for § 2(d) is well documented in the legislative history. An investigation of chain store buying practices undertaken by the Federal Trade Commission, at Congress' request, has indicated that § 2 of the Clayton Act was an inadequate deterrent against outright price discrimination. The investigation also revealed that certain practices by which large buyers induced concessions which their smaller competitors could not meet

were wholly beyond the reach of § 2. *It is significant that Congressional concern had focused on the buying practices of large retailers, particularly the chain stores, because it was felt that they were threatening the continued existence of the independent merchant.*" (Emphasis added)

Similarly, in *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 543-544 (1960), this Court said:

> "It is, of course, quite true—and too well known to require extensive exposition—that the 1936 Robinson-Patman Amendments to the Clayton Act were motivated principally by Congressional concern over the impact upon secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores."

In *Standard Motor Products, Inc.* v. *FTC*, 265 F. 2d 674, 676 (2d Cir. 1959), the Court said:

> "The statute (Robinson-Patman) was enacted in direct response to the growth of a few nation-wide chain store corporations in the 1920's and 1930's. It is evident from the legislative history that Congress sought to curtail the concentration of economic power in the distributive area of the economy by eliminating inequalities derived from sheer economic power while at the same time not stifling competition based on real cost savings and efficiency."

So, also, in *National Dairy Products Corp.* v. *FTC*, 395 F. 2d 517, 523 (7th Cir.) *cert. denied*, 393 U. S. 977 (1968):

> "One of the reasons for its (the Robinson-Patman Act) enactment was to protect the independents from the chains and other large buying groups."

And in the FTC report on chain store practices, upon which Congress based the Robinson-Patman Act, the following practices by chain stores, in general, and by the Petitioner, A & P, in particular, were singled out:

> "As shown elsewhere, the ability of the chain store to obtain its goods at lower cost than independents and of large chains to obtain goods at lower cost than small chains is an outstanding feature of the growth and development of chainstore merchandising. These lower costs have fre-

quently found expression in the form of special discounts, concessions, or collateral privileges which were not available to smaller purchasers. * * *

"There has been considerable criticism of some of the methods used by chain systems in their bargaining with manufacturers for special-price concessions. The criticism comes largely from the manufacturers themselves, many of whom protest the methods used while yielding to them. Some state their yielding was only as a result of 'threats' and 'coercion.' All of these cases of threats and coercion, however, seem to be reducible to chain-store statements or intimations to the manufacturers that unless the concessions sought were granted, the chain would either enter upon the manufacture of the goods in question for itself, buy them from some other source than the seller with whom it was then negotiating, or would discourage the sale of his products.

"A vivid idea of the enormous bargaining power embodied in chain-store purchases may be gained from the fact that The Great Atlantic & Pacific Tea Company makes purchases of merchandise amounting to over $800,000,000, annually, and other large chains make purchases in proportionate amounts.

* * * * *

"Fear of losing the business of certain chains through whom a large part of their output was marketed, and threat to manufacture a competing product were reasons assigned by some grocery manufacturers for acceding to the demand of chain-store buyers for special concessions in the way of special prices, discounts and allowances."

Federal Trade Commission, Final Report On The Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. 24, 26 (1935).

Three decades under Robinson-Patman apparently left no imprint on A & P, for it was predatory tactics of this very nature, the threat of taking its business elsewhere, which A & P employed to extract, from a reluctant Borden, the massive price discounts here involved.

Thus, in findings of Fact 34, 35 and 41 of the Initial Decision, the Administrative Law Judge found as follows:

> "34. A & P's business represented more than 55 percent of Borden's wholesale route business in the Chicago area and 25 percent of its Woodstock Plant production. Borden could not, therefore, afford to lose the A & P business by refusing to lower its prices to A & P (CX. 74 F, 42 A-D). * * * If Borden refused A & P's request for lower prices, Borden would lose A & P's business and the volume necessary to operate Woodstock efficiently. Neither position was desired.
>
> "35. On May 25, 1965, Tarr and Malone delivered Borden's offer for the outside areas to A & P and discussed Borden's position with Schmidt (CX 19A). Borden pointed out that it expected almost no profit from the A & P contract, but that it was presenting such a bid because A & P's business was vital to Borden's efficient use of its Woodstock Plant. * * *
>
> * * * * *
>
> "41. Malone calculated that if Borden lost A & P business Borden's gross profit would be reduced more than 1.6 million dollars per year. . . ."

It is incontestible that the acts of which the Petitioner, A & P, stands convicted, by the FTC and the Court of Appeals for the Second Circuit—the use of its massive purchasing power to extract huge, unwarranted discounts from the prices which Borden charged its other customers, were precisely the activities which Congress sought to proscribe when it enacted the Robinson-Patman Act; and the Amicus, Samuel and Lyla Parker, and the other independent grocers also buying from Borden, on whose behalf they brought the *Parker* suit as representative plaintiffs, were the very persons Congress sought to protect when it enacted the Robinson-Patman Act more than forty years ago.

II.

There Is No Question But That the Petitioner, A & P, Received Massive, Discriminatory Discounts on Its Purchases from Borden.

The Petitioner, A & P, attempts to belittle the discriminatory discounts involved in this case.

It does so by centering on the difference between the Borden offer, which it accepted, and the only competitive offer, that of the Bowman Dairy Company.

It characterizes the difference between the two offers as a "matter of mills." Pet.'s Br. 13, and asserts that the Borden bid was only "marginally (*i.e.*, no more than 1.5%, accepting the FTC's figures) lower than Bowman's offer." Pet.'s Br. 15.

A & P conveniently ignores the large, indeed huge, gap between the prices charged it under the contract and the prices which Borden charged the independent grocers in the contract area.

Attached to this Brief, as Exhibit A, is the Appendix to the Initial Decision in the FTC proceedings in this case. This exhibit consists of nine pages of tables showing the discounts received by A & P pursuant to the contract, during the first half of the contract period, on the five principal products covered by the contract—regular milk in gallon, half gallon and quart containers, and 2% milk and skim milk in half-gallon cartons—as compared to those given "non-A & P Stores." The right hand column on each table is labeled "percent overcharge"—and a footnote states that this percentage was "calculated by dividing the difference between the minimum price paid by others and the private label price paid by A & P."

This exhibit demonstrates, graphically, that there was massive, sustained discrimination against each and every independent grocer who bought from Borden in the contract area. For example, for regular milk in half-gallon cartons, the "percent

overcharge" ranged over the period covered (November 1, 1965 through December 31, 1968) from 9.7% to 13.9%; and for skim milk, in half gallon cartons, from 13.7% to 18.0%.

III.

The Discriminatory Discounts Here Involved Did Not Benefit the Consuming Public, Only A & P. Indeed, They Harmed That Public by Undermining the Competitive Position of Hundreds of Independent Grocery Stores.

The Petitioner, A & P, blandly asserts that the Decision of the Court of Appeals would operate "to deprive consumers of the benefits" of "bargaining by buyers and competition among sellers." Pet.'s Br. 14. Nothing could be further from the truth. A & P's customers derived no benefit whatsoever from the transactions here at issue. By agreement between A & P and Borden, the price discounts given A & P under the contract were not "passed on" to A & P's customers, the "consumers," but were instead retained, or pocketed by A & P.

Moreover, it has been recognized, particularly in the retail grocery field, that a price discrimination in favor of a large chain of stores can have a most adverse affect on its competitors even though the chain does not use the discriminatory price discounts it receives to undersell its competitors. *Foremost Dairies, Inc.* v. *FTC*, 348 F. 2d 674, 680 (5th Cir.), *cert. denied*, 382 U. S. 959, 86 S. Ct. 435, 15 L. Ed. 2d 362 (1965).

> "It is unnecessary that there be evidence that the favored customer actually undersold his rivals; a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field or it can enable him to offer a customer attractive services, which will give him a substantial advantage over his competition."

Accord, National Dairy Products Corp. v. *FTC*, 395 F. 2d 517, 522 (7th Cir.), *cert. denied*, 393 U. S. 977, 89 S. Ct. 444, 21 L.

> "[I]njury may be inferred even if the favored customer did not undersell his rivals, for a substantial price, advantage can enlarge the favored buyer's profit margin or enable him to offer attractive services to his customers."

Thus, the illegal price discounts received by A & P from Borden did not benefit the consuming public. On the contrary, they harmed the consuming public by injuring competition generally—by weakening the competitive position, vis a vis A & P, of hundreds of independent grocery stores, which also sold Borden products.

IV.

The Petitioner, A & P, Was Not In Good Faith When It Accepted the Borden Offer. A & P Believed That the Borden Offer "Beat," and Did Not Merely "Meet," the Only Competitive Offer A & P Had Received. A & P Was Also on Notice That Borden Did Not Have a Cost Justification Defense for Its Offer.

Subsection 2(f) of the Robinson-Patman Act forbids a buyer "knowingly to induce or receive a discrimination in price which is prohibited by this Section." Subsection 2(b) of the Act permits a seller to defend "by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor." 15 U. S. C. § 13(b, f).

We submit that in order to effectuate "the broad goals which Congress intended . . . [the Robinson-Patman Act] to effectuate" Subsections 2(b) and 2(f) should be construed *in pari materia.* That is to say, the buyer, as well as the seller, must be in "good faith" when it accepts a discriminatory offer on the ground that such offer only meets, but does not beat, the equally low price of a competitor.

By this test, the Petitioner, A & P, was very definitely not in "good faith" when it accepted the Borden offer.

In the first place, A & P believed that the Borden offer did not merely "meet," but that it "beat," the only competitive offer which A & P had received, that of the Bowman Dairy Co.

> "The second Borden bid was then reviewed by Herschel Smith, A & P's National Director of Purchases in New York. Smith testified that at the time, he regarded the second Borden bid as 'substantially better' than the Bowman bid." *Great Atlantic & Pacific Tea Co., Inc.* v. *FTC*, 557 F. 2d 971, 976 (2d Cir. 1977).

Secondly, the Petitioner, A & P, was on Notice, when it accepted the Borden offer, that Borden did not have a "cost justification" defense, but that its only possible defense was that it was meeting, but not beating, the equally low price of a competitor.

> "Minkler [of Borden] emphasized to A & P's Schmidt at the time this second bid was offered that it was being made only to meet the rival Bowman bid and that Borden knew 'of no other way to justify this.' Before accepting the second and final Borden bid, A & P's Schmidt requested a letter from Borden to the effect that the prices being offered A & P were proportionately available to others. Borden's 'availability letter' stated only that it felt its prices were proper under applicable law and that it was prepared to defend them." *Ibid.*

V.

The Business Practices Engaged in by the Petitioner, A & P, if Sanctioned by the Court, Would Permit A & P, and Other Retail Chains, to Resume the Very Business Abuses Which Motivated Congress to Enact the Robinson-Patman Act.

An examination of the position taken by the Petitioner, A & P, in this case, together with that taken by it in the *Parker* suit, indicates that A & P is endeavoring to reinstitute many of the same predatory business practices which Congress intended to prohibit when it enacted the Robinson-Patman Act more than 40 years ago.

As previously noted, prior to the enactment of the Robinson-Patman Act, retail store chains were able to use their massive purchasing power to extract, from their suppliers, large price discounts which were not justified, economically, by any "savings" resulting from the volume of those purchases. These discounts, in turn, gave the chains an enormous economic advantage over their smaller competitors.

In the *Parker* suit, the Petitioner, A & P, has taken the position, on the purported authority of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977), as interpreted by one Milton Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 831 Antitrust and Trade Reg. Rep. (BNA) F-1, at F-3 (1977), that there can be no recovery in a private antitrust suit, unless there has been an "antitrust injury," and that competitors of a large retail store chain, such as A & P, buying from the same supplier, sustain no "antitrust injury" when the chain, by economic coercion, obtains, from their common supplier, a price discount forbidden by Section 2(a) of the Robinson-Patman Act, *provided* that the chain does not use that discount to undersell those competitors. That is to say, there is no "antitrust injury" when the chain "pockets" the illegal discount, and uses it to strengthen its financial and competitive position generally, but does not "pass on" a part of the discount to the public in lower prices.

Obviously, if this position should be sustained, the Robinson-Patman Act very rapidly would become a dead letter.

The large retail chains of the Country could use their economic power to coerce large discounts from their suppliers by the threat of taking their business elsewhere, just as A & P did in this case. All that would be required to avoid legal liability would be that a chain represent to a given supplier that it had received, from an unnamed competitor of the supplier, an offer at a lower price than that charged by the supplier to the chain and to its other customers. It would not matter if no such offer

had ever been made. The supplier would be protected if it met but did not beat that competitive "offer," and, under the doctrine advanced by A & P in the *Parker* suit, the chain would in its turn be immune from suit provided it did not pass on the discount to the public in lower prices.

In this case, the Petitioner, A & P, does not go quite as far as it does in the *Parker* suit, but it comes close.

> "[T]he meeting competition defense remains available to a seller who makes a better offer in good faith, as other courts have consistently held. Thus Borden's offer was within that defense, and A & P should have been allowed to assert it." Pet.'s Br. 15.

Also, in *Parker,* again on the purported authority of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra,* the Petitioner has advanced a theory of damages which would likewise render the Robinson-Patman Act a legal nullity.

There now exists a marked difference of opinion, not yet resolved by this Court, among various Courts of Appeals and District Courts, as to the proper measure of damages recoverable in a Robinson-Patman Act suit. See *Fowler Mfg. Co.* v. *Gorlick,* 415 F. 2d 1248, 1250-1252 (9th Cir. 1969), *cert. denied,* 396 U. S. 1012, 90 S. Ct. 571, 24 L. Ed. 2d 503 (1970).

The matter is exhaustively considered in an annotation to the *Fowler* case, "Measure and Elements of Damages for Violation of the Robinson-Patman Act (15 U. S. C. § 13)." 9 ALR Fed. 279 (1971).

> "The principal division of authority over the question of damages in suits for violation of the Robinson-Patman Act concerns the so-called 'General Damage Rule, under which the Measure of Damages is the amount of the unlawful price or other unlawful payment. The Rule has been recognized or applied in some cases and rejected or refused application in others.
>
> * * * * *
>
> "Opposed to General Damages are the so-called 'Special' or 'Consequential' damages suffered by a plaintiff through

the loss of business or property as a result of the discrimination." *Id.* at 284, 285, 286.

At present, the General Damage Rule is followed in the Ninth Circuit, the Eighth Circuit, the Northern District of Illinois, and, probably, the Seventh Circuit. *Id.* at 289-292. The Special, or Consequential Damage Rule is followed in the Second Circuit, the Sixth Circuit, and the Districts of Louisiana and Massachusetts. *Id.* at 292-295.

Although the question of the quantum or measure of damages was not before the Court in the *Pueblo Bowl-O-Mat* case, or referred to in the Court's Opinion, the Petitioner, A & P, has taken the position, in *Parker*, that the *Pueblo Bowl-O-Mat* decision repudiates the Geneal Damage Rule, leaving only Special or Consequential Damages to be recovered in a private antitrust action for violations of the Robinson-Patman Act.

Obviously, if the favored chain does not "pass on" the illegal discriminatory discount to the public in lower prices, there is no way that its disfavored competitors could ever prove Special or Consequential Damages in the form of loss sales, or diversion of business to the chain.

Again, if such a position should be sustained, the Robinson-Patman Act very rapidly would become a dead letter. Suppliers of large chains would be protected if they met but did not beat "competitive offers" which the chain claimed to have received, whether or not, they, in fact, beat such other offers, and the chain would in its turn be immune from suit by its disfavored competitors provided only that it does not pass on the discount to the public in lower prices.

We submit that the case at bar is a proper one for the Court firmly to establish two propositions vital to effectuate the intent of Congress when it enacted the Robinson-Patman Act: One, that competitors of a chain, or other large merchandiser, that are buying from a common supplier, have sustained an "antitrust injury" when the chain receives, from that supplier, a discrimination in price forbidden by the Act, regardless of whether

the chain "passes on" the illegal discount to the public in lower prices; and, Second, that in such a case the measure of the damages sustained by the disfavored competitors of the chain is the amount of the illegal price discount received by that chain, that is to say, the General Damage Rule. Specifically, we suggest the Rule adopted by the Court of Appeals in *Fowler Mfg. Co.* v. *Gorlic, supra*:

> "[W]e hold that under the Robinson-Patman Act, unless the evidence establishes a greater consequential injury, discrimination in prices or allowances is entitled to be regarded as constituting a direct business injury and that the amount thereof thus properly can be made the basis and measure of a General Damage Award."

We must note that in the companion *Parker* case, the aggregate liability of the Petitioner, A & P, is readily ascertainable, under the General Damage Rule, on a class basis. It would be three times the amount of the illegal discount received by A & P during the contract period. It would only remain to apportion the aggregate award among the class plaintiffs, the independent grocers, in the contract area, who during the contract period, purchased milk and other dairy products from Borden.

Conversely, substantial difficulties would be encountered in the event of individual suits, by such independent grocers, against the Petitioner, A & P. Unlike the situation which would prevail in a suit against Borden for charging discriminatory prices in violation of Section 2(a) of the Robinson-Patman Act, the volume of purchases by any one independent grocer, and the prices which he had paid, would be irrelevant, at least initially, in determining the liability of A & P, under Section 2 (f) of the Act, for inducing and receiving a price discrimination forbidden by the Act. In any such separate suit by an independent grocer, it would appear to be necessary, First, to establish the aggregate liability of A & P for receiving the illegal discount, and only then to consider the volume of purchases, and the prices paid by the independent grocer, in determining the portion of the aggregate liability of A & P which

should be awarded to the independent grocer who was the plaintiff in that particular suit.

Obviously, to require such procedure, independent suits rather than class action, would entail an awesome duplication of judicial and legal effort. Also obvious is that a requirement that there by independent suits rather than a class action, would deter suits by independent grocers against chains which, like A & P, had received illegal discounts but which had also, like A & P, been prudent enough to retain them rather than use them to lower prices charged the consuming public. Few independent grocers would have an individual claim large enough to warrant a major legal effort against a corporate giant such as the Petitioner, A & P.

Needless to say, the Petitioner, A & P, has been most vociferous in its opposition to the maintenance of *Parker* as a class action.

And the position which it has taken in *Parker,* together with that in the case at bar, is persuasive that A & P has undertaken to repeal, judicially, the Robinson-Patman Act. And, of course, A & P's effort is most understandable; few federal statutes, in our history, have been directed at a single corporate entity as the Robinson-Patman Act was directed at the Petitioner, A & P, and its business practices prior to the enactment of that statute.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the Opinion of the Court of Appeals for the Second Circuit should be affirmed. In addition, for the reasons discussed above, we earnestly request that the Court, in its Opinion in this case, recognize that competitors of a large purchaser, recipient of a price discount forbidden by the Robinson-Patman Act, have suffered "antitrust injury" even though that purchaser did not use the illegal discount to lower prices to the consuming public,

and that the measure of damages recoverable by such competitors, is the amount of such illegal discount.

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EXHIBIT A

PRICES PAID FOR MILK BY A&P COMPARED TO LOWEST PRICE AVAILABLE TO ITS COMPETITORS IN THE "CHICAGO & SUBURBS AREA" 11/65-12/68

HOMO—HALF-GALLONS—PAPER

		Non-A&P Stores		A&P Stores		
Date	Borden List Price[1]	Minimum Price	Maximum Discount From List Price[2]	Private Label Price[3]	Discount From List Price	Percent Overcharge[4]
11/65-1/66	$0.49	$0.3479	29.0%	$0.3124	36.2%	11.4%
1/66-2/66	.49	.3430	30.0%	.3124	36.2%	9.8%
2/66-5/66	.51	.357	30.0%	.3254	36.2%	9.7%
5/66-8/66	.52	.364	30.0%	.3254	37.4%	11.9%
8/66-9/66	.54	.378	30.0%	.3376	37.5%	12.0%

1. Source: CX 137, 139-150.
2. Sources: CX 120, 138; Gose Tr. 1110.
3. Source: CX 255B.
4. Calculated by dividing the difference between the minimum price paid by others and the private label price by the private label price paid by A&P.

Date	Borden List Price	Non-A&P Stores: Minimum Price	Non-A&P Stores: Maximum Discount From List Price	A&P Stores: Private Label Price	A&P Stores: Discount From List Price	Percent Overcharge
9/66-10/66	$0.56	$0.392	30.0%	$0.3514	37.3%	11.6%
10/66-11/66	.56	.392	30.0%	.3534	36.9%	10.9%
11/66-3/67	.56	.392	30.0%	.3514	37.3%	11.6%
3/67-4/67	.55	.385	30.0%	.3376	38.6%	14.0%
4/67-5/67	.55	.385	30.0%	.3416	37.9%	12.7%
5/67	.57	.399	30.0%	.3502	38.6%	13.9%
5/67-9/67	.57	.399	30.0%	.3534	38.0%	12.9%
9/67-5/68	.59	.413	30.0%	.3664	37.9%	12.7%
5/68-7/68	.61	.427	30.0%	.3762	38.3%	13.5%
7/68-12/68	.62	.434	30.0%	.3828	38.3%	13.4%

A2

HOMO—GALLONS—PAPER

Date	Borden List Price	Non-A&P Stores: Minimum Price	Non-A&P Stores: Maximum Discount From List Price	A&P Stores: Private Label Price	A&P Stores: Discount From List Price	Percent Overcharge
00/65-00/66	$0.98	$0.6958	29.0%	$0.6248	36.2%	11.4%
00/66-00/66	.98	.686	30.0%	.6248	36.2%	9.8%
00/66-00/66	1.02	.714	30.0%	.6508	36.2%	9.7%
00/66-00/66	1.04	.728	30.0%	.6508	37.4%	11.9%
00/66-00/66	1.08	.756	30.0%	.6752	37.5%	12.0%
00/66 00/66	1.12	.784	30.0%	.7028	37.3%	11.6%
10/66-11/66	1.12	.784	30.0%	.7068	36.9%	10.9%
11/66-3/67	1.12	.784	30.0%	.7028	37.3%	11.6%
3/67-4/67	1.10	.770	30.0%	.6752	38.6%	14.0%

A3

Date	Borden List Price	Non-A&P Stores		A&P Stores		Percent Overcharge
		Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	
4/67-5/67	$1.10	$0.770	30.0%	$0.6832	37.9%	12.7%
5/67	1.14	.798	30.0%	.7004	38.6%	13.9%
5/67-9/67	1.14	.798	30.0%	.7068	38.0%	12.9%
9/67-5/68	1.18	.826	30.0%	.7328	37.9%	12.7%
5/68-7/68	1.22	.854	30.0%	.7524	38.3%	13.5%
7/68-12/68	1.24	.868	30.0%	.7656	38.3%	13.4%

HOMO—QUARTS—PAPER

Date	Borden List Price	Non-A&P Stores		A&P Stores		Percent Overcharge
		Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	
11/65-1/66	$0.265	$0.1882	29.0%	$0.1712	35.4%	9.9%
1/66-2/66	.265	.1855	30.0%	.1712	35.4%	8.4%
2/66-5/66	.275	.1925	30.0%	.1777	35.4%	8.3%
5/66-8/66	.28	.1960	30.0%	.1777	36.5%	10.3%
8/66-9/66	.29	.2030	30.0%	.1838	36.6%	10.5%
9/66-10/66	.30	.2100	30.0%	.1907	36.4%	10.1%
10/66-11/66	.30	.2100	30.0%	.1917	36.1%	9.6%
11/66-3/67	.30	.2100	30.0%	.1907	36.4%	10.1%
3/67-4/67	.295	.2065	30.0%	.1838	37.7%	12.4%

Date	Borden List Price	Non-A&P Stores		A&P Stores		Percent Overcharge
		Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	
4/67-5/67	$0.295	$0.2065	30.0%	$0.1858	37.0%	11.1%
5/67	.305	.2135	30.0%	.1901	37.7%	12.3%
5/67-9/67	.305	.2135	30.0%	.1917	37.2%	11.4%
9/67-4/68	.315	.2205	30.0%	.1982	37.1%	11.3%
4/68-7/68	.325	.2275	30.0%	.2031	37.5%	12.0%
7/68-12/68	.33	.2310	30.0%	.2064	37.5%	11.9%

2% MILK—½ GALLON—PAPER

Date	Borden List Price	Non-A&P Stores		A&P Stores		Percent Overcharge
		Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	
11/65-1/66	$0.46	$0.3266	29.0%	$0.2914	36.7%	12.1%
1/66-2/66	.46	.3220	30.0%	.2914	36.7%	10.5%
2/66-5/66	.48	3360	30.0%	.3044	36.6%	10.4%
5/66-8/66	.49	.3430	30.0%	.3044	37.9%	12.7%
8/66-9/66	.51	.3570	30.0%	.3166	37.9%	12.8%
9/66-10/66	.53	.3710	30.0%	.3304	37.7%	12.3%
10/66-11/66	.53	.3710	30.0%	.3324	37.3%	11.6%
11/66-3/67	.53	.3710	30.0%	.3304	37.7%	12.3%
3/67-4/67	.52	.3640	30.0%	.3166	39.1%	15.0%

Date	Borden List Price	Non-A&P Stores		A&P Stores		Percent Overcharge
		Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	
4/67-5/67	$0.52	$0.3640	30.0%	$0.3206	38.4%	13.5%
5/67	.54	.3780	30.0%	.3292	39.0%	14.8%
5/67-9/67	.54	.3780	30.0%	.3324	38.4%	13.7%
9/67-5/68	.56	.3920	30.0%	.3454	38.3%	13.5%
5/68-7/68	.58	.4060	30.0%	.3552	38.8%	14.3%
7/68-12/68	.59	.4130	30.0%	.3618	38.7%	14.2%

SKIM MILK—½ GALLON—PAPER

Date	Borden List Price	Non-A&P Stores		A&P Stores		
		Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
11/65-1/66	$0.46	$0.3266	29.0%	$0.2834	38.4%	15.2%
1/66-2/66	.46	.3220	30.0%	.2834	38.4%	13.6%
2/66-5/66	.48	.3360	30.0%	.2964	38.2%	13.4%
5/66-8/66	.49	.3430	30.0%	.2964	39.5%	15.7%
8/66-9/66	.51	.3570	30.0%	.3086	39.5%	15.7%
9/66-10/66	.53	.3710	30.0%	.3224	39.2%	15.1%
10/66-11/66	.53	.3710	30.0%	.3244	38.8%	14.4%
11/66-3/67	.53	.3710	30.0%	.3224	39.2%	15.1%
3/67-4/67	.52	.3640	30.0%	.3086	40.7%	18.0%
4/67-5/67	.52	.3640	30.0%	.3126	39.9%	16.4%
5/67	.54	.3780	30.0%	.3212	40.5%	17.7%

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

OPPOSITION TO MOTION OF SAMUEL E. PARKER AND LYLA E. PARKER FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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On September 26, 1978, the undersigned counsel for petitioner The Great Atlantic & Pacific Tea Company, Inc. ("A&P") received a "Motion of Samuel E. Parker and Lyla E. Parker For Leave to File a Brief Amicus Curiae and Brief as Amicus Curiae". A&P opposes this motion on several grounds.

First, the motion is untimely. According to this Court's Rule 42(3), a motion for leave to file an *amicus curiae* brief "may timely be presented to the court". While "timely" is not defined, the leading treatise in this field notes that "timely" means "in time to permit the filing of a brief on the merits within the time specified" in Rule 42(2), which is "the time allowed for the filing of the brief of the party supported". Stern & Gressman, *Supreme Court Practice,* § 13.13 at 726 (5th ed. 1978). Here, the brief of the Federal Trade Commission ("FTC"), pursu-

ant to an extension of time granted by the Clerk of the Court, was due on August 5, 1978.* Counsel for the movants (the "Parkers") had been advised months prior to that date that A&P would not consent to their filing an *amicus* brief in this case, but they did not submit the instant motion until almost seven weeks thereafter—without any attempt to justify their untimeliness.

In addition, the Parkers' "interest" is far too narrow to permit their participation here.** Their motion is essentially an attempt to capitalize on the FTC's decision against A&P (which the Parkers assert will be *prima facie* "evidence of almost every element of proof necessary to establish the liability of A&P" for damages) and to obtain an assist from this Court on the issue of the measure of damages to be applied in their private action under § 2(f) —a subject extensively addressed in their proposed brief but not relevant here.

If it were to be injected into this case, the issue of damages would needlessly complicate these proceedings. For example, A&P would be required to show that Exhibit A to the Parkers' brief, which allegedly compares Borden's prices to A&P with the lowest prices given to non-A&P customers of Borden, does nothing of the sort.***

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* In fact, A&P did not receive the FTC's brief until September 5, 1978.

** Plaintiffs' class action claim has been rejected as "manifestly ill-suited to class action treatment". *Parker* v. *The Great Atl. & Pac. Tea Co.*, No. 71-C-3075, slip op. at 4 (N.D.Ill., Aug. 9, 1978). Thus, despite frequent references in their motion and brief to "other independent grocers", the plaintiffs represent only themselves as former owners of a retail grocery store in Chicago.

*** The prices listed for the non-A&P stores on Exhibit A were taken from general price lists and discount schedules allegedly disseminated by Borden. They are not net prices, and do not reflect any of the special discounts and allowances which were almost

Finally, the other responsive arguments raised by the Parkers (*e.g.*, regarding the goals of the Robinson-Patman Act, and A&P's good faith) have, we submit, been adequately presented by the Solicitor General.*

For all of the above reasons, the Parkers' motion should be denied.

Dated: New York, New York
September 29, 1978

Respectfully submitted,

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universal in the dairy industry. Nor was any proof presented at the hearing that those prices were actually charged to *any* customer of Borden. Furthermore, Exhibit A ignores the differences in the services received by A&P and the non-A&P stores.

* One argument raised by the Parkers, but not by the FTC, is the allegation that by "agreement between A&P and Borden", A&P did not lower the retail price for the private label milk it received from Borden. That claim was disposed of by the Commission when it dismissed Count III of the original FTC complaint against A&P. The Commission ruled that "the record contains no evidence suggesting that Borden and A&P discussed the price A&P would charge retail customers" and that the evidence presented does not "in any way convince us that A&P ever gave Borden the assurance that A&P would not create a price differential at the retail level" (87 F.T.C. 1047, 1066).